(24,962)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 269.

THE STATE OF CALIFORNIA, PLAINTIFF IN ERROR,

vs.

DESERET WATER, OIL & IRRIGATION COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JUNE 27, 1916.

a Sac., 2081.

In the District Court of Appeal of the State of California in and for the Third Appellate District.

Civil No. 972.

DESERET WATER, OIL AND IRRIGATION COMPANY (a Corporation), Plaintiff and Respondent,
vs.
THE STATE OF CALIFORNIA, Defendant and Appellant.

Transcript on Appeal from the Judgment of the Superior Court of the State of California, in and for the County of Mono, and from the Order of said Court Denying Appellant's Motion for a New Trial.

Hon. William S. Wells, Judge.

U. S. Webb, Attorney General of the State of California, Attorney for Appellant.
A. H. Ricketts, Attorney for Respondent.

Filed this — day of March, A. D. 1912. G. H. Chase, Clerk, by —— ——, Deputy Clerk.

1 *Transcript on Appeal.*

In the Superior Court of the State of California in and for the County of Mono.

DESERET WATER, OIL AND IRRIGATION COMPANY, a Corporation, Plaintiff,
vs.
THE STATE OF CALIFORNIA, JOHN DOE, RICHARD ROE and PETER PINK, Defendants.

Complaint in Condemnation.

The plaintiff complains of defendants and for cause of action alleges:

I.

That plaintiff is a corporation organized and existing under and by virtue of the laws of the State of Nevada and engaged in and authorized to do business within the State of California, under and by virtue of the laws thereof; that the name of the plaintiff is Deseret Water, Oil & Irrigation Company.

2 II.

That in and by its Articles of Incorporation the plaintiff was and is authorized and empowered, among other things, to acquire, purchase, sell, preserve and maintain water rights, water sheds and sources; to acquire, purchase, sell, lease, equip, operate and maintain canals, laterals, aqueducts, flumes, tunnels, ditches, pipes and pipe lines and all their appurtenances for supplying, selling and distributing water and power to mines, farming neighborhoods, precincts, cities, towns, villages and other municipal divisions and to corporations or individuals for drainage, reclamation and irrigating lands; to acquire, purchase, sell, lease, construct, equip, operate and maintain ditches, reservoirs, dams, tunnels, levees, viaducts, bridges, embankments, excavations and the sites therefor for the collection, storage, selling and distribution of water; to acquire, purchase, sell, lease, construct, equip, operate and maintain pumps and pumping plants, electrical lighting and power plants, electric light and power lines, oil pipe lines and all the necessary appurtenances thereto; to acquire, purchase, sell, mortgage, lease, exchange, hold and condemn real property and all estates of whatsoever nature and description for the purposes of marketing,
3 selling, storing, furnishing and transporting water, light, power, heat, petroleum oil and natural gas to such places as this corporation may think necessary or convenient for the purposes of its business; to engage in and carry on the business of boring for, producing, refining, distributing, treating, manufacturing, piping, carrying, handling, storing, owning, holding, buying, and selling petroleum oil, natural gas, asphalt, bitumen, bituminous rock and other mineral and hydro-carbon substances and for such purposes to buy and otherwise acquire, hold, own, manage and operate refineries, pipe lines, tanks, manufactories, machinery, wharves, tank cars, steam and sailing vessels for water transportation and other works, property and appliances that may be incidental or auxiliary to said business or which this corporation may think necessary or convenient for the purposes of its business; to control, lease, and obtain rights of way, easements and franchises for the purpose of marketing, selling, storing, furnishing and transporting water, light, power, heat, petroleum oil and natural gas to such places as this corporation may think necessary or convenient for the purposes of its business; to generate, vend and distribute electric light and power to such places as this corporation may think necessary or convenient for the purposes of its business, by means of poles, wires, con-
4 duits and sub-ways, or otherwise, over and through other lands or water, or both, if the purposes of this corporation may so require.

III.

That the defendants are the State of California, John Doe, Richard Roe and Peter Pink, and said defendants claim to be the owners and claimants of the property sought to be condemned under these proceedings, to wit: Section Sixteen (16), Township One (1)

North, Range Twenty-five (25) East, Mount Diablo Base and Meridian, in the County of Mono, State of California.

IV.

That said land, to wit: said Section Sixteen (16), Township One (1) North Range Twenty-five (25) East, Mount Diablo Base and Meridian and the whole of said tract is necessary for the public use aforesaid, viz: For the purpose of preserving and maintaining water rights, water sheds and sources, equipping, operating and maintaining canals, laterals, aqueducts, flumes, tunnels, ditches, pipes and pipe lines with all their appurtenances for supplying, selling and distributing water and power to mines, farming neighborhoods, precincts, cities, towns, villages and other municipal divisions, and to corporations or individuals, for drainage, reclamation and irrigating lands and of constructing, equipping, operating, and maintaining ditches, reservoirs, dams, tunnels, levees, viaducts, bridges, embankments, excavations and the sites therefor for the collection, storage, sale and distribution of water and for constructing, operating and maintaining pumps and pumping plants, electrical lighting and power plants, electric and power lines, oil pipe lines and all the necessary appurtenances thereto and for the generation and distribution of electric light and power to such places as said corporation, plaintiff, may think necessary or convenient for the purpose of its business by means of poles, wires, conduits, and sub-ways or otherwise over and through said Section Sixteen and thence over and through other lands and water, or both, as the purposes of this corporation shall require.

V.

That none of said tract of land, to wit: said Section Sixteen (16), Township One (1) North Range Twenty-five (25) East, Mount Diablo Base and Meridian, has heretofore been appropriated to any public use.

VI.

That the proper names of the said defendants, John Doe, Richard Roe and Peter Pink are unknown to plaintiff, and are, therefore, herein designated by fictitious names, and plaintiff prays that when their true names are discovered, they may be inserted by proper amendment to this complaint.

Wherefore, plaintiff prays that the court will ascertain and assess the value of the property herein sought to be condemned; that said land be condemned to said proposed public use, to wit: for the public use of said plaintiff, and that plaintiff may have such other and further relief as may be meet in the premises.

A. H. RICKETTS,
Attorney for Plaintiff.

Duly verified and filed June 23, 1911.

[Title of Court and Cause.]

Amended Answer.

Comes now defendant above named, and, by leave of the court first had and obtained, files this, its amended answer, to the complaint of plaintiff herein, as follows:

I.

7 Said defendant denies that plaintiff is a corporation; denies that plaintiff is a corporation organized and existing, or organized or existing, under and by virtue, or under or by virtue, of the laws of the State of Nevada, or otherwise, or at all; denies that plaintiff is engaged in, and is authorized to do business within the State of California, or that plaintiff is engaged in or is authorized to do business in said State, or elsewhere, under and by virtue, or under or by virtue of the laws of said State, or otherwise, or at all.

In this behalf defendant alleges that it was sought to organize and form plaintiff for more than one purpose, and that such purposes are distinct, inconsistent and unrelated; that the articles of incorporation through and by which it was sought to organize and form plaintiff contain, and there are therein set forth several distinct, inconsistent and unrelated purposes.

II.

Defendant alleges that the land described in plaintiff's complaint is surveyed land, and is wholly situate within the exterior boundaries of a permanent reservation.

III.

8 Defendant denies that the land described in said complaint, or any part thereof, is necessary or required for the public use as alleged in paragraph IV of said complaint, or that said land, or any part thereof is necessary or required by said plaintiff for any use whatever.

Wherefore, defendant prays that plaintiff take nothing by this action, and that defendant be hence dismissed with its costs.

U. S. WEBB,
Attorney General of the State of California,
Attorney for Deft. State of California.

Served & filed Sept. 20th, 1911.

[Title of Court and Cause.]

Findings of Fact and Conclusions of Law.

This cause came on regularly for trial on the 20th day of September, 1911, before the above entitled Court sitting without a jury.

The action was dismissed as to the defendants John Doe, Richard Roe and Peter Pink.

A. H. Ricketts, Esq., appeared as counsel for the plaintiff and Hon. U. S. Webb and Hon. R. C. Van Fleet for the defendant.

The Court having heard proof of the facts alleged in the complaint and other pleadings on file herein, and the arguments
9 of the respective counsel herein, and this action having been submitted to the Court for its decision, the Court now finds the following facts:

Findings of Fact.

I.

That the plaintiff, Deseret Water, Oil & Irrigation Company, at the time of bringing this action and prior thereto was, and now is a corporation organized and existing under and by virtue of the laws of the State of Nevada and engaged in and authorized to do business within the State of California.

II.

That the object, business and purposes to be transacted, promoted and carried on by said corporation, plaintiff, and the purposes for which it was and is formed, among other things, are as follows, to wit: To acquire, purchase, sell, preserve and maintain water rights, water sheds and sources; to acquire, purchase, sell, lease, equip, operate and maintain canals, laterals, aqueducts, flumes, tunnels, ditches, pipes and pipe lines and all their appurtenances for supplying, selling and distributing water and power to mines, farming neighborhoods, precincts, cities, towns, villages and other
10 municipal divisions and to corporations or individuals for drainage, reclamation and irrigating lands; to acquire, purchase, sell, lease, construct, equip, operate and maintain ditches, reservoirs, dams, tunnels, levees, viaducts, bridges, embankments, excavations and the sites therefor for the collection, storage, selling and distribution of water; to acquire, purchase, sell, lease, construct, equip, operate and maintain pumps and pumping plants, electrical lighting and power plants, electric light and power lines, oil pipe lines and all the necessary appurtenances thereto; to acquire, purchase, sell, mortgage, lease, exchange, hold and condemn real property and all estates of whatsoever nature and description for the purpose of marketing, selling, storing, furnishing and transporting water, light, power, heat, petroleum oil and natural gas to such places as said corporation, plaintiff, may think necessary or convenient for the purposes of its business; to engage in and carry on the business of boring for, producing, refining, distributing, treating, manufacturing, piping, carrying, handling, storing, owning, holding, buying and selling petroleum oil, natural gas, asphalt, bitumen, bituminous rock and other mineral and hydro-carbon substances and for such purposes to buy and otherwise acquire, hold,

own, manage and operate refineries, pipe lines, tanks, manu-
11 factories, machinery, wharves, tank cars, steam and sailing vessels for water transportation and other works, property and appliances that may be incidental or auxiliary to said business or which said corporation, plaintiff, may think necessary or convenient for the purposes of its business; to control, lease, and obtain rights of way, easements and franchises for the purpose of marketing, selling, storing, furnishing and transporting water, light, power, heat, petroleum oil and natural gas to such places as said corporation, plaintiff, may think necessary or convenient for the purposes of its business; to generate, vend and distribute electric light and power to such places as said corporation, plaintiff, may think necessary or convenient for the purposes of its business, by means of poles, wires, conduits and sub-ways, or otherwise, over and through lands or water, or both, if the purposes of said corporation, plaintiff, may so require.

III.

That the corporation, plaintiff, at the time of bringing this action and prior thereto, was and now is in charge of a public use and public uses, viz:

Preserving and maintaining water rights, water sheds and
12 sources, equipping, operating and maintaining canals, laterals, aqueducts, flumes, tunnels, ditches, pipes and pipe lines with all their appurtenances for supplying, selling and distributing water and power to mines, farming neighborhoods, precincts, cities, towns, villages and other municipal divisions, and to corporations or individuals, for drainage, reclamation and irrigating lands and of constructing, equipping, operating and maintaining ditches, reservoirs, dams, tunnels, levees, viaducts, bridges, embankments, excavations and the sites therefor for the collection, storage, sale and distribution of water and for constructing, operating and maintaining pumps and pumping plants, electrical lighting and power plants, electric and power lines, oil pipe lines and all the necessary appurtenances thereto and for the generation and distribution of electric light and power to such places as said corporation, plaintiff, may think necessary or convenient for the purposes of its business by means of poles, wires, conduits and sub-ways or otherwise over and through Section Sixteen, Township 1 North Range 25 East, Mt. Diablo Meridian, containing 640 acres of land, situate, lying and being within the County of Mono, State of California, is a necessary and public use and is necessary for such use by the plain-
tiff herein for the purposes and public uses hereinbefore in
13 this paragraph particularly mentioned and set out.

IV.

That the general contour of said Section Sixteen, Township 1 North Range 25 East, Mt. Diablo Meridian, is rugged and steep. Parts of said section are peculiarly adapted for the purposes of ir-

rigation in affording a place and places therein for the construction and maintenance of dams, reservoirs, tunnels, levees, viaducts, embankments, excavations and the sites therefor, for the irrigation of adjoining and other lands, and of ditches, pipes and flumes for the collection, storage, selling and distributing water. Other parts of said section are peculiarly adapted for the construction and maintenance of oil pipe lines for the transportation of petroleum and other mineral oils. Other parts of said section are peculiarly adapted for the construction and maintenance of electrical plants and electric heat and power lines for the purpose of marketing, selling, furnishing and transporting light, power and heat.

That because of the inclemency of the weather at and in the neighborhood of said tract of land during the winter months of each year duplicate systems of ditches, flumes, pipe lines and
14 electric light, heat and power lines in different parts of said section are and will be necessary to ensure uninterrupted service of water and electric light, power and heat, and preserve the adaptability of the oil pipe lines therein for the purpose for which they are constructed, and the whole of said Section Sixteen, Township 1 North Range 25 East, Mt. Diablo Meridian is necessary for said public use and uses hereinbefore particularly mentioned and set out.

That the location of said tract of land by the corporation, plaintiff, for such necessary public uses was and is made in the manner which is most compatible with the greatest public good and the least private injury.

V.

That the defendant, State of California, is the owner of said tract of land and the whole thereof.

That no part of said tract of land has heretofore been appropriated to any public use.

VI.

That at the date of the issuance of the summons in this action, to wit: on the 23rd day of June, 1911, the actual value of said
15 tract of land was One dollar for each acre therein contained. That said tract of land contains 640 acres.

Conclusions of Law.

From the foregoing facts the Court hereby finds and decides:

I.

That the corporation, plaintiff, at the time of bringing this action, was and it still is the agent of the State of California in charge of a public use authorized by law, viz: Canals, aqueducts, reservoirs, tunnels, flumes, ditches and pipes for conducting and storing water for the use of the inhabitants of Mono County and the villages and

towns therein; canals, reservoirs, dams, ditches, pondings, flumes, aqueducts and pipes for irrigation, supplying mines and farming neighborhoods with water; oil pipe lines, canals, reservoirs, dams, ditches, flumes, aqueducts and pipes and outlets natural and otherwise for supplying, storing and discharging water for the operation of machinery, for the purpose of generating and transmitting electricity for the supply of mines, quarries, railroads, tramways, mills and factories with electric power; and also for the applying of electricity to light and heat mines, quarries, mills, factories, in-
16 corporated cities and counties, villages and towns, and also for furnishing electricity for lighting, heating or power purposes to individuals or corporations, together with the lands, buildings and all other improvements in or upon which to erect, install, place, use or operate machinery for the purpose of generating and transmitting electricity for any of the purposes or uses above set forth; electric power, electric heat lines, and electric light, heat and power lines.

II.

That the defendant, the State of California, is the owner of the tract of land described in the complaint in this action and also herein particularly mentioned and described, to wit: Section Sixteen (16), Township One (1) North, Range 25 East, Mt. Diablo Base and Meridian, in the County of Mono, State of California.

III.

That the corporation, plaintiff, have and take for its own use in fee for the purpose of preserving and maintaining water rights, water sheds and sources, equipping, operating and maintaining canals, laterals, aqueducts, flumes, tunnels, ditches, pipes and pipe lines with all their appurtenances for supplying, selling and distributing
17 water and power to mines, farming neighborhoods, precincts, cities, towns, villages and other municipal divisions, and to corporations or individuals, for drainage, reclamation and irrigating lands and of constructing, equipping, operating, and maintaining pipes, ditches, reservoirs, dams, tunnels, levees, viaducts, bridges, embankments, excavations and the sites therefor for the collection, storage, sale and distribution of water and for constructing, operating and maintaining pumps and pumping plants, electrical lighting and power plants, electric and power lines, oil pipe lines and all the necessary appurtenances thereto and for the generation and distribution of electric light and power to such places as said corporation, plaintiff, may think necessary or convenient for the purpose of its business by means of poles, wires, conduits and subways or otherwise over and through said section Sixteen and thence over and through other lands and water, or both, as the purposes of said corporation, plaintiff, shall require, the certain tract of land, situate, lying and being in the County of Mono, State of California, and more particularly described as follows, to wit:

Section Sixteen (16), Township 1 North, Range 25 East, Mt. Diablo Base and Meridian, in the County of Mono, State of California.

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IV.

That the corporation, plaintiff, pay as compensation and damages to the said defendant, the State of California, the sum of $640, together with defendant's costs herein, in gold coin of the United States of America.

Judgment is hereby ordered to be entered accordingly.

Dated this 10th day of January, 1912.

WM. S. WELLS,
Judge Presiding.

Filed Jan. 15th, 1912.

[Title of Court and Cause.]

Judgment.

This cause having come on for trial on the 20th day of September, 1911, before Hon. W. S. Wells, Superior Judge, and the issues therein arising upon the complaint of plaintiff and the answer of the defendant, the State of California, having been duly tried before the Court, sitting without a jury, and the Court having found and determined that the use and uses to which the tract of land hereinafter particularly described is to be applied — for a public use and uses authorized by law, and the taking of said land is necessary to such use and uses,

19 Now, therefore, on motion of A. H. Ricketts, Esq., attorney for the plaintiff,

It is ordered, adjudged and decreed that the plaintiff take and acquire and have for its own use in fee for the purpose of preserving and maintaining water, rights, watersheds and sources, equipping, operating and maintaining canals, laterals, aqueducts, flumes, tunnels, ditches, pipes and pipe lines with all their appurtenances for supplying, selling and distributing water power to mines, farming neighborhoods, precincts, cities, towns, villages and other municipal divisions and to corporations or individuals for drainage, reclaimation and irrigating lands and of constructing, equipping, operating and maintaining ditches, reservoirs, dams, tunnels, levees, viaducts, bridges, embankments, excavations and the sites therefor, for the collection, storage, sale and distribution of water, and for constructing, operating and maintaining pumps and pumping plants, electric lighting and power plants, electric and power lines, oil pipe lines, and all the necessary appurtenances thereto, and for the generation and distribution of electric lights and power to such places as said corporation, plaintiff, may think necessary or convenient for the use of its business by means of poles, wires, conduits and sub-ways or otherwise over, through and across the land hereinafter particu-

20 larly described that certain tract of land situate, lying and being in the County of Mono, State of California, and more

particularly described as follows, to wit: Section Sixteen (16), Township One (1) North Range Twenty-five (25) East Mt. Diablo Meridian, containing Six hundred and forty (640) acres of land, and that the plaintiff pay as compensation and damages to the said defendant, the State of California, said State of California being the owner and entitled thereto, the sum of Six hundred and forty ($640) dollars for said tract of land and the whole thereof, together with its costs taxed at $—.

Done this 10th day of January, 1912.

WM. S. WELLS,
Judge Presiding.

Filed Jan. 15th, 1912, and entered Jan. 15th, 1912, in Book C of Judgments at page 127.

[Title of Court and Cause.]

Bill of Exceptions on Behalf of Defendant, the State of California, to be Used on Appeal from Judgment and on Motion for New Trial.

Be it remembered: That this cause came on regularly for trial on the 20th day of September, 1911, before the Court sitting
21 without a jury, and the Honorable William S. Wells, Judge of said Court. The plaintiff appeared by A. H. Ricketts, its attorney; the defendant, the State of California, appeared by U. S. Webb, its Attorney General, and thereupon the following proceedings were had:

Mr. Ricketts: I now offer in evidence the articles of incorporation of the Deseret Water, Oil & Irrigation Company, together with the certificate of the Secretary of State of this State attached thereto.

Mr. Webb: We object, on the ground that the articles of incorporation are incompetent to prove the incorporation, and on the further ground that the offer shows the attempt to form a corporation for divers inconsistent and different primary purposes, such as the operation of a power line, to furnish electric light, the operation of a gas concern, building of railroads, mining and various other independent and distinct businesses.

The Court: The objection will be overruled.

Mr. Webb: We take an exception.

Defendant's Exception No. 1.

The articles of incorporation were then admitted in evidence, marked "Plaintiff's Exhibit 1," and read as follows:

22 No. 17790.

Frank C. Jordan, Secretary of State.

Frank H. Cory, Deputy.

STATE OF CALIFORNIA,
Department of State:

I, Frank C. Jordan, Secretary of State of the State of California, do hereby certify that I have carefully compared the annexed copy of Articles of Incorporation of 'Deseret Water, Oil & Irrigation Company' with the certified copy of the original now on file in my office, and that the same is a correct transcript therefrom, and of the whole thereof. Also that this authentication is in due form and by the proper officer.

Witness my hand and the Great Seal of State, at office in Sacramento, California, the 6th day of June, A. D. 1911.

(Signed) FRANK C. JORDAN,
[SEAL.] *Secretary of State,*
By —— ——, *Deputy.*

Office of George Brodigan, Secretary of State.

Geo. W. Cowing, Deputy.

THE STATE OF NEVADA,
Department of State:

[SEAL.]

I, George Brodigan, the duly elected, qualified and acting Secretary of State of the State of Nevada, do hereby certify that the annexed is a true, full and correct transcript of the certified copy
23 of the original Articles of Incorporation of 'Deseret Water, Oil & Irrigation Company' as the same appears on file and of record in this office.

In witness whereof, I have hereunto set my hand and affixed the Great Seal of State, at my office in Carson City, Nevada, this 2nd day of June, A. D. 1911.

[SEAL.] GEORGE BRODIGAN,
Secretary of State,
By GEO. W. COWING, *Deputy.*

Articles of Incorporation of Deseret Water, Oil & Irrigation Company.

This is to certify that we, the undersigned, do hereby voluntarily associate ourselves into a corporation under and by virtue of an Act of the Legislature of the State of Nevada, entitled 'An Act Providing a General Corporation Law,' approved March 16th, 1906, and the Acts amendatory thereof and supplemental thereto.

First. The name of this corporation is and shall be 'Deseret Water, Oil & Irrigation Company.'

Second. The location of the principal office and place of business of this corporation in the State of Nevada is and shall be at Number 116 North Carson Street, at Carson City, in the County of Ormsby, in the State of Nevada, and the resident agent therein and in charge thereof is the State Agent and Transfer Syndicate, Incorporated, but an office may be maintained at Number 40 California Street, in the City and County of San Francisco, in the State of California, or at such other place or places as may be named by its Board of Directors, or as the same may be fixed by the By-Laws of this corporation.

Third. The business, objects and purposes to be transacted, promoted and carried on by this corporation and the purposes for which it is formed are to acquire, purchase, sell, preserve and maintain water rights and water sheds and sources; to acquire, purchase, sell, lease, equip, operate and maintain canals, laterals, aqueducts, flumes, tunnels, ditches, pipes and pipe lines with all their appurtenances, for supplying, selling and distributing water and power to mines, farming neighborhoods, precincts, cities, towns, villages and other municipal divisions, and to corporations or individuals for drainage, reclamation and irrigating lands; to acquire, purchase, sell, lease, construct, equip, operate and maintain ditches, reservoirs, dams, tunnels, levees, viaducts, bridges, embankments, excavations and the sites therefor for the collection, storage, sale, and distribution of water; to acquire, purchase, sell, lease, construct, equip, operate and maintain pumps and pumping plants, electrical lighting and power plants, electric light and power lines, oil pipe lines and all the necessary appurtenances thereto; to acquire, purchase, sell, mortgage, lease, exchange, hold and condemn real property and all estates of whatsoever nature or description for the purposes of marketing, selling, storing, furnishing, and transporting water, light, power, heat, petroleum oil and natural gas to such places as this corporation may think necessary or convenient for the purposes of its business; to prospect, locate, acquire, purchase, sell, lease, mortgage, and hold mines and mineral lands, mining locations, mining claims, mining rights, mines and mineral deposits of every description; to mine and operate the same, extract the minerals therefrom, locate, equip, operate and maintain mining plats, machinery, reduction works and smelters and generally to do any and every act and thing necessary and usual in the business of mining; to engage in and carry on the business of boring for, producing, refining, distributing, treating, manufacturing, piping, carrying, handling, storing, owning, holding, buying and selling petroleum oil, natural gas, asphalt, bitumen, bituminous rock and other mineral and hydro-carbon substances and for such purposes to buy and otherwise acquire, hold, own, manage and operate refineries, pipe lines, tanks, manufactories, machinery, wharves, tank cars, and steam and sailing vessels for water transportation and other works, property and appliances that may be identical or auxiliary to said business or which this corporation may think necessary or convenient for the purposes of its business. Also, to establish and carry on agencies, offices,

storage tanks and houses, and to sell the products manufactured or produced by itself or other persons or corporations in the State of Nevada and in other States and Territories of the United States of America; to acquire, purchase, sell, lease, construct, equip, operate and maintain railways and tramways of whatsoever power operated, ferries, bridges, viaducts, roads and turnpikes; to engage in, conduct and carry on the business of common carriers of freight and passengers by land and water; to purchase and sell miners' and farmers' supplies and general merchandise of every description; to control, lease and obtain rights of way, easements and franchises for purposes of marketing, selling, storing, furnishing and transporting water, light, power, heat, petroleum oil and natural gas to such places as this corporation may think necessary or convenient for the purposes of its business; to construct and operate such buildings, structures, machinery, appliances and devices which this corporation may think necessary or convenient for the purposes of its business; to generate, vend and distribute electric light and power to such places as this corporation may think necessary or convenient for the purposes of its business by means of poles, wire and conduits and subways, or otherwise, over and through other lands and
27 water, or both, if the purposes of this corporation shall so require. Also to enter into partnership or in to any arrangement for sharing profits, union of interests, co-operation, joint adventure, reciprocal concession or otherwise, with any person, firm or corporation carrying on or engaged in, or about to carry on or engage in any business or transaction which this Corporation is authorized to carry on, or engage in any business or transaction capable of being conducted so as to directly or indirectly benefit this corporation. Also to take and acquire by purchase, exchange or other lawful modes, and to hold, own, deal in, sell, and otherwise dispose of mining locations, mining claims, mining rights, real property and the capital stock, debentures, or bonds of other corporations, and while the owner thereof to exercise all the right- or privileges of ownership including the right to vote thereon, and in general to do and perform any and all acts or things of whatsoever name or nature incident to, growing out of, or connected with the purposes, objects and business for which this Corporation is formed.

Fourth. The total atuhorized capital stock of this corporation is One Hundred Thousand ($100,000.00) Dollars, divided into One Thousand (1000) shares of the par value of One Hundred ($100.00) Dollars each.

The amount of the subscribed capital stock with which
28 this corporation has commenced business is One Thousand ($1,000.00) Dollars.

The amount actually subscribed is One Thousand ($1,000.00) Dollars.

Fifth. The name and Post Office address and residence of each of the original subscribers to the capital stock of this corporation and the amount subscribed by each are as follows:

Name.	Post office address.	Number of shares.
H. G. Van Vactor,	San Francisco, Calif.	Four.
John A. Chestnut,	Oakland, Calif.	Four.
Mabel E. Worth,	San Francisco, Calif.	Two.

Sixth. No period is limited for the duration of the existence of this Corporation, but its existence shall be perpetual.

Seventh. The affairs of this Corporation shall be managed by a governing Board and the members of such Board shall be styled Directors and the number of such Directors shall be three.

Eighth. The capital stock after the amount of the subscribed price or par value has been paid, shall not be subject to assessment to pay the debts of this Corporation, or for any other purpose whatsoever, and the same shall be forever non-assessable.

Ninth. This Corporation shall have power to conduct its business in all its branches and to have one or more offices in the State of Nevada, and in all other States and Territories, and in foreign countries.

29 In witness whereof we have hereunto set our hands and seals this 1st day of June, 1911.

H. G. VAN VACTOR. [SEAL.]
JOHN A. CHESTNUT. [SEAL.]
MABEL E. WORTH. [SEAL.]

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

On this 1st day of June, in the year one thousand nine hundred and eleven, before me, Flora Hall, a Notary Public in and for said City and County, personally appeared H. G. Van Vactor, John A. Chestnut, and Mabel E. Worth, Known to me to be the persons described in, whose names are subscribed to and who executed the within instrument, and who acknowledged to me that they executed the same freely and voluntarily, and for the uses and purposes therein mentioned

In witness whereof I have hereunto set my hand and affixed my official seal at my office in the City and County of San Francisco, the day and year in this Certificate first above written.

[SEAL.] FLORA HALL,
Notary Public in and for the City and County of San Francisco, State of California.

30 STATE OF NEVADA,
County of Ormsby, ss:

I, E. O. Patterson, County Clerk of Ormsby County, State of Nevada, and ex officio Clerk of the District Court, in and for the County of Ormsby, do hereby certify that the forgoing is a full, true and correct copy of the original Articles of Incorporation of the 'Deseret Water, Oil & Irrigation Company,' which now remains on file and of record in my office in Carson City, in said County.

In testimony whereof, I have hereunto set my hand and affixed my official Seal at Carson City, in said County and State, this 2nd day of June, A. D. 1911.

[SEAL.] E. O. PATTERSON, *Clerk.*

Endorsed: Filed in the office of the Secretary of State the 5th day of June, 1916. 65392. Frank C. Jordan, Secretary of State, by Frank H. Cory, Deputy. Record Book — Page —.

Endorsed: Field, Jun. 2, 1911. E .O. Patterson, Clerk. Filed, Jun. 2, 1911. Eugene Brodigan, Secretary of State, by Geo. W. Cowing, Deputy."

31 Mr. Ricketts: I now offer in evidence the certificate of the Secretary of State of the State of Nevada showing the filing of the articles of said Company.

Mr. Webb: On the objection to this certificate I want to add this in addition to my objection to the articles of incorporation; that this is an alleged corporation seeking here to exercise here a delegated function of the State, and such may not be done by a de facto corporation. That delegated function of the state government, state control of sovereignty, can be exercised only by a de jure corporation.

The Court: The objection will be overruled.

Mr. Webb: We take an exception.

Defendant's Exception No. 2.

The certificate was then introduced in evidence, marked "Plaintiff's Exhibit No. 2," and reads as follows:

"STATE OF NEVADA,
Department of State:"

I George Brodigan, Secretary of State of the State of Nevada, do hereby certify that the 'Deseret Water, Oil & Irrigation Company' did on the second day of June, 1911, file in this office a certified copy of its Articles of Incorporation; that said Articles are now on file and of record in the office of the Secretary of State of the
32 State of Nevada, and further, that said Articles contain all the statements of facts required by the law of said State of Nevada.

In Witness Whereof, I have hereunto set my hand and affixed the Great Seal of State, at my office in Carson City, Nevada, this second day of June, A. D. 191—.

[SEAL.] GEORGE BRODIGAN,
Secretary of State.
By GEO. W. COWING, *Deputy.*

A. H. RICKETTS, called as a witness in behalf of plaintiff, and being duly sworn, testified as follows:

I am the president of the corporation, plaintiff in this action. The corporation plaintiff was formed for the purposes as set forth in

the complaint in this case, which briefly may be stated as for the purpose of irrigating lands in the vicinity of Mono Lake, in Mono County, in this State; for the purpose of transporting and selling to the miners at and near the vicinity, oil miners at and near the vicinity of said lake; also the erection of power houses and the distribution of electric power for light, heating, and such other purpose as it may be useful for. In following out the purposes of this corporation, it became necessary to acquire lands in the vicinity of Mono Lake,
and the plaintiff, as the agent of this State, selected for its
33 purpose Section 16 in Township 1 North, Range 25 East,
Mount Diablo Base & Meridian, being the section situated within a forest reserve, and the suit was brought by virtue of the legislative provision permitting condemnation suits to be brought against the State of California; consequently it is sought, for the purposes of this company, to condemn said section for these purposes, for the purpose of preserving and maintaining water rights, water sheds and sources, equipping, operating and maintaining canals, laterals, aqueducts, flumes, tunnels, ditches, pipes, and pipe lines, with all their appurtenances, for supplying, selling and distributing water and power to mines, farming neighborhood, precincts, cities, towns, villages, and other municipal divisions, and to corporation or individuals for drainage, reclamation and irrigating land, and for constructing, equipping, operating and maintaining ditches, reservoirs, dams, tunnels, levees, viaducts, bridges, embankments, excavations, and the sites therefor; for the collection, storage, selling and distribution of water, and for constructing, operating and maintaining pumps and pumping plants, electrical lighting and power plants, electric and power lines, oil pipe lines, and all the necessary appurtenances thereto; and for the generation and
distribution of electric light and power to such places as said
34 corporation, the plaintiff herein, may think necessary or
convenient for the purposes of its business, by means of poles, wires, conduits, and sub-ways, or otherwise, over and through said Section 16, and thence over and through other lands and water, or both, as the purposes of this corporation shall require. Those are the purpose and purposes only for which this land is sought to be condemned, and for no other purpose, although there may be other purposes set forth in the Articles of Incorporation. In order to carry out this scheme of ours, as I have just detailed it to the Court, it may be proper for me to say to you something about the characteristics, as I might say, of the land itself. For instance, a creek, known as Levining Creek, runs through this section.

Mr. Webb: Mr. Ricketts, may I ask if you are testifying to your knowledge of the situation?

The Witness: I am testifying to my knowledge as far as this is concerned, from the United States geological quadrangle. I have never been upon the ground personally.

Mr. Webb: If the United States map from which you are testifying should prove erroneous, it might develop that you do not want this land at all?

The Witness: Well, in the event that it should be proved erroneous, possibly not.

35 Mr. Webb: I want you in this case to testify to what you know.

The Witness: Well, I don't know that.

Mr. Webb: Then, no more.

The Witness: Then I will go on with the purposes, and show the necessity of this land for our use, and as a public use. We want to put a dam upon that property near Ellery Lake, which is sometimes called Rhinedollar Lake. This probably as we intend will flood the lower part of Section 16 in controversy. Then our purpose is to take out a pipe line from that lake, and carry it around the hill on the southerly side of the section, and drop it down near the easterly side of the section; but, in order to have two strings to our bow, we will likely carry a pipe line along the other side of the canyon, on the northerly side of Section 16, and drop it to the same or another powerhouse to be erected by us. As a third string to our bow, we intend to carry the pipe line down a canyon or gorge directly in order to protect ourselves against possible snowslides, waterspouts, or other destructive influences that may possibly arise in that section, or section of the country. We further intend, on the northerly side of the section and connecting the western side of the section, near what is known as Warren Creek—we intend to install separately power-houses and separating the buildings

36 for employees, so that if the same were destroyed by snowslides, others will still be left; consequently, in our opinion, it is necessary that we have the whole of the section. And we intend further to hold back for irrigating around Mono Lake such waters as may be within this section, and, as I have previously stated, also for the purpose of supplying water to oil miners who are sinking oil wells around or near the lake; and we intend to utilize power in pumping or diverting the waters of Mono Lake out into big ponds which we intend to have made with clay bottoms and sides, and after the water is in part evaporated, to put in some fresh water and precipitate the minerals that may be within the waters of the lake. That is, of course, another enterprise, but not connected with this Section 16, excepting indirectly.

Mr. Ricketts: I now offer in evidence a certified copy of a resolution passed by the corporation plaintiff, through its directors, on the 28th day of August, 1911. It is as follows: "Special meeting of the directors"——

Mr. Webb: We object to the offer, on the ground that it is immaterial, irrelevant and incompetent; not proving or tending to prove any issue involved here. We have no objection to its form, or that it is not a certified copy.

The Court: The objection will be overruled.

37 Mr. Webb: We take an exception.

Defendant's Exception No. 3.

The resolution was then introduced in evidence, marked "Plaintiff's Exhibit No. 3", and reads as follows:

"Special Meeting of Directors.

"At a regularly called meeting of the Directors of the Deseret Water, Oil & Irrigation Company, held at its Office in the City, and County of San Francisco, in the State of California, this 28th day of August, 1911, there was a legal quorum of said directors present, to wit: Messrs. A. H. Ricketts, John A. Chestnut, and Mabel E. Worth; Absent, none.

After due and legal proceedings, the following Resolution was adopted:

Resolved, that the president of this corporation be and he is hereby authorized and directed for and in its behalf and in its name, to take immediate steps, upon such terms and conditions as he may deem proper and fair to the interests of the Stockholders of this Corporation, (subject, however, to the approval of this Board of Directors), to acquire, own, use or lease, occupy, develop, contribute to, subsidize or otherwise aid or take part in the operation of and in the construction and maintenance of water rights, ditches, flumes, aqueducts, canals, and other water ways, and such other property and interest in or concerning the same, or any interest or estate therein,
38 as may be necessary or proper to establish and conduct the business of irrigating lands in or about the vicinity of Mono Lake, in this State, and to furnish, transmit and convey water to the oil wells and the oil miners drilling or operating oil wells in the vicinity of said Lake, and to enter into contracts with reference thereto and all other contracts of whatsoever kind which are usually or which may properly be incident to the business aforesaid in all its branches; that the President is further authorized and directed to obtain estimates for the construction of power houses for the purpose of furnishing and distributing electric current for light, heat and mechanical power, and the cost of furnishing and transmitting the same to the points selected for such distribution, and the cost of laying oil pipe lines and of building tanks and structures to convey, transmit and take care of petroleum oil and other hydro-carbon substances produced or to be produced in the vicinity of said Lake, and of rights-of-way in connection therewith, and also estimates of the cost of the construction of dams, reservoirs, ditches, flumes, aqueducts and pipes, on Section Sixteen, Township One North, Range Twenty-five East, M. D. M. and outlets therefrom for the purpose of generating and transmitting electricity to mines, villages, towns, individuals, and corporations in Mono County, and other counties near thereto, for light, heat and power.'

39 I hereby certify the foregoing to be a full, true and correct transcript from the Minute Book of the Board of Directors of Deseret Water, Oil & Irrigation Company, and a full, true and correct copy of the Resolution adopted at a regularly called meeting of said Directors, held at the office of said corporation in the City and County of San Francisco, State of California.

Witness my hand this 19th day of September, 1911.

(Signed) MABEL E. WORTH,

Secretary of Deseret Water, Oil & Irrigation Company."

Mr. Ricketts: I offer in evidence an agreement made and entered into between the Deseret Water, Oil & Irrigation Company and A. M. Gillespie, dated the 19th day of September, 1911.

Mr. Webb: To which we object as incompetent, irrelevant and immaterial; not tending to prove anything in this action; as subsequent to the commencement of the action here, and having no tendency or bearing upon any matter which the Court is now concerned with.

The Court: It will be admitted.

Mr. Webb: We take an exception.

Defendant's Exception No. 4.

The agreement was then introduced in evidence, and marked "Plaintiff's Exhibit No. 4," and reads as follows:

40 "This agreement made in duplicate this 19th day of September, 1911, by and between Deseret Water, Oil & Irrigation Company, a Corporation, organized and existing under and by virtue of the laws of the State of Nevada, the party of the first part and A. M. Gillespie, of the State aforesaid, the party of the second part,

Witnesseth: That the said party of the first part hereby grants to the said party of the second part the right to purchase from it, said party of the first part, at any time within thirty (30) days from the date hereof, Fifty Thousand (50,000) Shares of the Capital Stock of said Corporation for the sum or price of Six ($6.00) Dollars per share in United States Gold Coin of the present standard.

In consideration of the payment to the said party of the first part of the full purchase price of said Stock, to wit: Three Hundred Thousand ($300,000.00) Dollars, the said party of the first part shall cause to be issued and delivered to the said party of the second part, Certificates representing Fifty Thousand (50,000) Shares of its Capital Stock, as fully paid up and non-assessable.

If said option be not exercised within said Thirty (30) days, then said party of the first part may dispose of said Shares to any other person or party, and the said party of the second part hereby relinquishes any and all claim thereto, or to any part thereof,

41 or to any right or privilege whatsoever hereunder.

It is further understood and agreed that in the event of the purchase of said Shares of Stock as hereinbefore provided, the said party of the second part shall have the right to nominate and have elected or appointed to office as a Director of said Corporation, a person to be named by him, said party of the second part.

In witness whereof, the said party of the first part has hereunto, and to its duplicate, caused its corporate name to be hereunto subscribed, and its corporate seal to be hereunto affixed by its officers hereunto duly authorized, and the said party of the second part has hereunto set his hand, the day and year first above written.

DESERET WATER, OIL &
IRRIGATION COMPANY,
By A. H. RICKETTS,
Its President.
By MABEL E. WORTH,
Its Secretary.
A. M. GILLESPIE."

Cross-examination:

Mr. Ricketts: I can't tell what portion of this section is to be covered by the power line I speak of, nor can I describe the power line or its character, except as I did in my direct testimony. I cannot tell how it is to be constructed; I am not an engineer,
42 and we have not employed our engineers yet. I have simply been authorized to take steps. I think the power line will be above ground on poles. It is our idea that it will, but our engineer may recommend some other source. There are to be two power lines. We expect to construct those two power lines in accordance with the plans of our engineer, and he has not yet been employed. I can't state at this time to my knowledge how much of this 640 acres of land will be required for the power line purchase. I can't state of my own knowledge how much of this 640 acres is to be included or covered by our reservoir. It is my information that the larger portion of this section lies on the mountain side, extending almost to the top. I understand it is a very rugged country. I understand a very large portion of it might be used for reservoir purposes, but I am only testifying from my understanding. I can't tell how many acres we are going to put in reservoir. There is a third line running down the cañon. It runs across this section also. I do not know what distance, but I think the entire distance, or practically so. If we construct a reservoir it will be on the lowest part of the section. I can't go into the details of how on the section our conduit will run because I am not familiar with them, but proof will be presented on these subjects by a Civil Engineer. No work has thus far been done in the
43 construction of power lines or water reservoirs or conduits. Our company has the promise of money with which to do this work. We have not the money yet. There will be no lack of funds, I can assure you of that, from the parties who are behind me. "One of the purposes of the company is the extracting of mineral from the waters of Mono Lake, precipitating the minerals. I understand the water of the Lake is heavily impregnated with salt, soda, borax and other minerals. Our company is in a financial condition to go forward with the work." There is plenty of money back of this, moneyed stockholders. The money is promised by the stockholders; there will be no lack of funds to carry out this project; we have not the funds absolutely in the treasury as yet. We asked for this 640 acres of land because I understand from those who are better advised than I am that it will be necessary because of the inclemency of the weather, snow slides and other things of that character, water spouts and so on and the terrific storms that prevail in that country, for us to practically duplicate our plant, in order to be safe and not be cut off from supplying our customers. That is the reason we want to duplicate the plant.

Q. Will either of the plants be constructed so they will be beyond the reach of these destroying elements?

44 A. That is what we fear was not possible, and that is as I said before the reason we want to duplicate the plant. In one instance we are to have a third string to our bow.

Q. On the theory that it is less probable that two will be destroyed than one?

A. Yes; they being in different positions. I believe there is a confluence of Levining Creek and Warren Creek within this section. We intend to locate some of our works there, and we are going to erect a big dam near Lake Ellery within section 16 which would flood about half the section. Lake Ellery is in the southwest portion of the section and Levining Creek and Warren Creek are northerly and northeasterly of section 16. All the water rights within section 16, according to my knowledge, information and belief, are already appropriated, and consequently we will have to acquire our water rights from the present proprietors thereof. We get no water rights nor seek to gain any by this proceeding. There are no water rights that can be acquired by us other than by consent of the present proprietors, who are private individuals. At present we have no water with which to supply this reservoir.

Q. If you cannot obtain the water from the streams flowing to the site of your proposed reservoir you would have no use for your reservoir, would you?

45 A. I do not know. I do not know what our Engineer might advise with reference to the waters which we would secure from Lake Ellery. I am not advised at this moment that we have any right to the use of the waters of Lake Ellery. We own no water rights there at present. I don't know that we would have no need for this land if our company should fail to obtain water with which to supply the proposed reservoir.

FRANCIS R. READ, a witness called on behalf of the plaintiff, sworn, and testified as follows:

I reside in San Francisco; I have resided there about twenty-five years; I am a mining and civil engineer; I have followed that profession for about thirty years. I acquired a theoretical knowledge of my profession in the Sheffield Scientific School of Yale College, New Haven; graduated in 1877, and have been actually employed in the practice of my profession ever since. I was an assayer for the United Consolidated Mines of *Sierra* Gorda in 1878 and 1879, and while I was there I was appointed United States Deputy Surveyor. I was afterwards assistant Geologist of the United States Geological Survey, and assisted Dr. G. F. Bentley on the Comstock Mines.

Mr. Webb: We will admit the witness' qualifications as a Civil Engineer.

46 Witness (continuing): I know generally the land described in the complaint in this action as section 16, tp. 1 N., R. 25 E., Mt. Diablo Base and Meridian. It is situated in what is known as the Mt. Lyle Quadrangle of the United States Geological Survey. This is a plat or diagram of that quadrangle.

Mr. Ricketts: We offer it in evidence, in connection with the testimony of this witness.

Plat admitted in evidence and marked "Plaintiff's Exhibit No. 5."

Witness (continuing): The land covers a portion of Lake Ellery and a portion of Levining Creek northeasterly of the lake and the land on both sides of that creek to its confluence with Warren Creek. The surface of the land is rough and practically bare of soil, and barren of vegetation with the exception of some chaparral brush and a few scattering trees.

Q. Assuming that a corporation is formed for the purpose of preserving and maintaining water rights, water sheds and sources, equipping, operating and maintaining canals, laterals, aqueducts, flumes, tunnels, ditches, pipes and pipe lines, with all their appurtenances for supplying, selling and distributing the water and power to mines, farming neighborhood, precincts, cities, towns, villages,

(Here follows map marked page 46½.)

and other municipal divisions, and to corporations or in-
47 dividuals for drainage, reclamation, and irrigating land, and for constructing, equipping, operating and maintaining ditches, reservoirs, dams, tunnels, levees, viaducts, bridges, embankments, excavations, and the sites therefor, for the collection, storage, sale and distribution of water, and for constructing, operating and maintaining pumps and pumping plants, electrical lighting and power plants, electric and power lines, oil pipe lines, and all the necessary appurtenances thereto, and for the generation and distribution of electric light and power by means of poles, wires, conduits, and sub-ways, or otherwise, over and through said Section 16, what, in your opinion as a civil engineer, is the adaptability of the land you have described for the purposes set forth in my question?

A. Well, it would appear to me that it was well adapted for the purposes.

Q. Now, then, assuming the facts to be as stated in my last previous question, what, in your opinion as a civil engineer, is the necessity of this land for a corporation to carry out the projects outlined in that hypothetical question that I just stated to you?

A. For the purpose of constructing and installing dams and reservoirs, pipe lines, ditches, power-houses and buildings pertaining thereto, in my opinion all the land which I have described
48 is necessary, and a greater area, more than is included in what I have described.

Q. What was the fair market value of that land on the 23rd day of June, 1911, that being the day the Summons was issued in this action?

A. You mean in my opinion?

Q. What was the value of the land on that day?

MAP

TOO

LARGE

FOR

FILMING

A. It didn't appear to me to have any intrinsic value. Very little if any intrinsic value.

Q. Well, what do you mean by very little value?

A. Well, I should not think more than possibly a dollar an acre."

Cross-examination:

I have been on and over this land. The surface of the land is mostly of granite rock, and it is especially precipitous; has considerable fall; just what the fall is I could judge better by this topographical map; that appears to be practically correct, those contours on that map, taking the general scale into consideration. The contemplated reservoir is at about the lowest point. I am judging a great deal from this map, without making a detailed survey, which shows the confluence of the two streams there, the natural point of storage, and Ellery Lake at the higher point. I couldn't answer how many acres would be within the contemplated reservoir;
49 I have made no detailed estimate or anything of that kind. It has a natural reservoir site. A power line would be constructed with poles, wires, etc. Taking the project as outlined, I should think the probability, the power house would be situated on the lower corner of the section, the lowest point of the section, and the power line would probably start from there. That would be the northeast corner of the section. There is the Lake here (indicating) this brings in Warren Creek, that is the creek coming down to that corner, and then the pole line and power lines probably wouldn't be but very little on the section. The power houses and the works, the ditches and plant to bring the power there would, of course, be on the section. I should judge the power would be quickly led away from the section. "The survey for the reservoir has not been made by me. I don't know that it has been made. I don't know that the power line, or either of them, has been surveyed. I don't know the contemplated location of the power houses, no further than the natural topography of the country would suggest to me. I have not made a location survey for those works. I do not know that anyone has. No location survey has been made, to my knowledge. I have not made a map showing the termini of the power lines. No one has, to my knowledge. No such map
50 is in existence, to my knowledge. I have no map showing the site and location of the contemplated reservoir. No one has, to my knowledge. No such map is in existence, to my knowledge. No such location has been made, any more than the natural country has made it. As a- engineer, by my inspection of the section I saw there a place that I think could be utilized as a reservoir, that was my judgment. I do not know the extent of the reservoir site any more than the natural features of the country would suggest that an engineer would take advantage of. I do not know the acreage of such land; I do not know of any actual survey or outline; that would be a matter of finance. It is contemplated to convey the water that will be impounded in this new reservoir to other

points, as I understand. The conduits through which the water will be conveyed would start there, quickly leaving it. It don't require much of this section of land for the purpose of the power lines, whether there be one or two or three constructed, as outlined by the project. In conserving the waters at Lake Ellery, you might, as a portion of this project, carry that water, for instance, in a ditch or pipe, and then take it down for power, and from that reservoir you would need practically all of the land of the section. Lake Ellery is higher than the reservoir site. If it were sought to
51 carry the Lake Ellery water to the reservoir site it would have to be done by a ditch or pipe line, and in that case it would cross this section on either or both sides of the creek. The stream in Levining Creek. Levining Creek is the natural outlet of Lake Ellery, and if you take the waters from a dam or from Lake Ellery you carry it around for instance by a ditch or pipe line around that confluence bringing it out to the eastern boundary of the section, and then down to your power house, or on this side you carry it around the northern boundary of the section and by pipe lines. I consider the project of carrying the waters of Lake Ellery down to the northeast corner of the section by means of a pipe line would require practically the whole section. The pipe line itself occupies only the area which it covers. You want to protect the pipe and it might require the whole land to do it. It might require a section a mile wide to protect it from snowslides. You might want to construct another pipe line on the opposite side as a safeguard of the first. You might want to construct three. I would not want to be restricted in order to safeguard my investment and safeguard my customers that I might have. I might have to protect my contract, and I would want to safeguard that by putting in possibly pipe lines on both sides of the Creek. I should want the right to
52 project the works there, and to protect them from snowslides which is somewhat a matter of local conditions. I would put the pipe lines underground, where I could. That is the natural way. I might want to build a cover over ground. I do not know that twenty-five feet of ground on either side of the pipe line would be ample as a right of way across the land over which it would be carried. As a general proposition that is true. I might want at any time to change my line. That would be all that is necessary for a ditch or a pipe through the land. All that would be required for power house purposes is the ground upon which to place the power house, with convenient space about for its use. As I look at the project as an engineer that is installing and putting in such work as is contemplated by that project I would want to feel that I wouldn't want to be restricted to one location. I might want to move the location later, to construct power houses not now contemplated and to construct power lines or water conducts not now contemplated. As I look at it, I think that it is very probable that they might be contemplated. I think the whole section is required, both as to what is necessary and what is necessary as a safeguard to what I put in originally. I look at it in this way,—it is better

to have the whole section, because I want not only to utilize
53 all the power that I can get there, but I want to safeguard what I put in. I do not know of any exact location, any designated location of these power lines to cross this section or to be constructed upon it.

Redirect examination:

Appurtenant to a ditch and pipe line, other than the right of way there are of course the construction of all the engineering features necessary, of road and anchorage, and your pipe line, for your ditches, for instance, *still* ways for your ditches. I mean by *still* ways, surplus water that you- ditch might collect on its course, after the ditch is overloaded by additions in its course you might want to spill it out, and that flows down as waste water. That would not necessarily be confined to the right of way. The overflow from your ditch flows down over the land between your ditch and the stream or natural water course below. The *still* way is to get rid of the surplus water in the ditch. The anchorage in a pipe line is to take up the weight and pressure of the pipe on a side hill and it has to be anchored or tied down to the ground. Just how far it would extend I cannot say; it is a question of engineering on the ground. It might extend in some places for a considerable distance, and other places not. I might need a great deal more land
54 in some places than I would in others for that purpose. From my knowledge of the situation there, I think the anchorage might extend beyond the twenty-five foot limit of the right of way, but I want to have such latitude for that purpose, however far it might extend. By latitude I mean width of country or ground to work in. I might possibly need more than the twenty-five foot limit. This proposed ditch from my knowledge of the country I would say would be more or less serpentine and follows generally the contour of the country, irregular, in and out. The sinuous lines would prevail over the straight lines.

Recross-examination:

Mr. Webb: Within the range of your experience, have you ever known of a ditch so constructed or anchored with *still* ways so arranged as to require a right of way a mile in width?

Mr. Ricketts: We will object to that question. There is nothing here to show that there would be a mile between the right of way and the boundary line of this section.

The Court: He may answer the question.

Mr. Ricketts: We take an exception.

Plaintiff's exception No. 1.

A. I can't recollect at the present time, but to my mind I would have to make way with that water; that is, I would have to have the right to discharge it. We have not had much of that
55 thing to do in California. The surplus water would come in I think naturally from little streams of melting snow

beyond what you have let into the ditch. I would construct a ditch large enough to convey all the water which we have stored or are holding but the waters that would flow in there that you are uncertain of at times you would want *still* ways for, simply for the aqueduct which conveys the water is comparatively small, but you have got to construct the ditch, and maintain it, and you want all the land I judge in that section for that purpose. You want your road, your access to the ditch, or your pipe line and whatever is necessary to the construction of the ditch and you want to pass through the land and have that always accessible. I figure that we would construct a ditch on both sides of Levining Creek, therefore I would need a *still* way from each side. It would only be needed down hill, but that takes in practically the section. In my judgment, as an engineer, the right of way, including the *still* way or *still* ways, would require a width of one mile. The character of the country from the northeast corner of this section up Levining Creek rises very quickly. The map gives it as 1,500 feet in a mile. The ground is granite rock, practically bare, very steep on both sides; there is some brush. It is what you say is precipitous in
56 places. There is some scattering trees. It is of the same general character as of the surrounding country.

Mr. Ricketts: Plaintiff rests.

Mr. Webb: If your Honor please, the defendant now asks and moves the Court for a judgment of non-suit on the ground that plaintiff has wholly failed to prove a single averment in its complaint. It has failed to show that it intends to construct the works described. It has failed to show that it requires, even assuming that the works described will be constructed, the section of land described in the complaint. If it is shown, assuming that the construction will be made, any portion of the land, it is some portion less than the whole, and the testimony has failed absolutely to identify the portion of the section that would be required, assuming the construction will be made. Further, it has failed to show the line of ditches, that is, the course of ditches, place of beginning and place of ending. It has failed to show a capacity to construct any ditch. It has failed to show the termini of the pipe lines; it has failed to show its intention or ability to construct a pipe line. It has failed to show the termini of a power line or power lines. It has failed to show an intention or ability to construct power line or power lines. Again, it has absolutely failed to show a ne-
57 cessity, any public necessity for a single improvement, power line, reservoir, ditch or pipe line that it has spoken of in testimony; a total failure of showing, the one chief, controlling and absorbing element in cases of this character, namely, that there exists that public necessity which justifies the State in permitting the plaintiff to exercise a portion of its governmental function, and upon these grounds the defendant asks for a non-suit.

The Court: The motion will be denied.

Mr. Webb: We will take an exception. I would like to add to

that statement or motion, that the map required by the statute in proceedings of this character has not been furnished.

Defendant's Exception No. 5.

J. F. LYON, called as a witness on behalf of the defendant, and sworn, testified as follows:

I reside at Sacramento, and am clerk in the Surveyor General's office; have occupied that position over eight years. I have never been upon the land described in the complaint, personally. It is correctly described.

Mr. Ricketts: I will admit that the land described in the complaint is within the confines of the Mono Forest Reservation, and that the Mono Forest Reservation, within which these lands
58 are situated, was established by proclamation of the President of the United States.

Witness (continuing): The lands in question were withdrawn from sale by the State, by an act of the Legislature, and can only be used as basis for indemnity lieu selections. The Surveyor General offered all the lands as basis for indemnity selections, except forty acres in the Southeast quarter of the Northeast quarter, of which the State has sold an indemnity certificate entitling the purchaser to surrender that land, and apply for unappropriated public land in lieu of it. An indemnity certificate based on the southeast quarter of the northeast quarter of the land in controversy is still outstanding; has not been used; as to remainder of the land in controversy all of it has been offered for indemnity selection which are pending in the General Land Office. What we call scrip has been sold for it, 600 acres. There were 160 acres of it used before the Act of 1909; the balance has been sold and used since that act. It was sold at public auction. There were several different certificates.

Q. What was the purchase price of the scrip for which this land was used as base?

Mr. Ricketts: I object, as being immaterial, irrelevant and incompetent, and as not tending to prove any issue in this case.
59 The Court: He may testify, subject to the objection.
Mr. Ricketts: An exception.

Plaintiff's Exception No. 2.

Witness (continuing): Several indemnity certificates were issued, the price ranging from $2.80 to $3.00. Indemnity Certificate No. 5, issued for the northeast quarter of the northeast quarter of the section, was sold at $3.05 an acre; Indemnity Certificate No. 10, embracing the northwest quarter of the northeast quarter of said section, sold at $2.80 per acre: Indemnity Certificate No. 14, issued for the northeast quarter of the northwest quarter, and southwest quarter of the northeast quarter of said section, was sold for $3.00 per acre: Indemnity Certificate No. 16, issued for the northwest quarter of the northwest quarter, and the southeast quarter of the northwest quarter,

was sold for $3.05 per acre; Indemnity Certificate No. 18, issued for the southwest quarter of the northwest quarter, and the northeast quarter of the southwest quarter, was sold for $3.05 per acre; Indemnity Certificate No. 21, issued for the southeast quarter of the northeast quarter, sold at $3.00 per acre; Indemnity Certificate No. 42, issued for the southwest quarter of the southwest quarter of said section, was sold at $3.45 per acre; Indemnity Certificate No. 43, issued for
60 the northwest quarter of the southwest quarter, and the southeast quarter of the southwest quarter, was sold at $3.40 per acre.

Mr. Webb: We rest.

J. F. LYON, recalled by plaintiff, testified as follows:

I do not know that prior to any of the sales that I have mentioned here as taking place in regard to this section of land that the State of California had exhausted its lieu rights. The Surveyor General is commanded by the statute to hold a public sale every sixty days; these certificates do not give any title to the land. The land does not belong to the Government. The selections have been accepted, for the most part, in the local United States Land Offices, and sent on to the General Land Office at Washington, where they are pending. Simple acceptance or approval by the Department at Washington is all that is necessary to transfer title. The indemnity certificates were all issued on May 3, 1909.

The foregoing is all of the evidence introduced in said cause.

61 *Specifications of Insufficiency of the Evidence.*

The defendant the State of California now specifies the following particulars wherein the evidence is insufficient to justify the decision or findings of the court:

1. The evidence does not prove or show that the plaintiff Deseret Water, Oil, and Irrigation Company, at the time of bringing this action and prior thereto was, and now is, a corporation organized and existing under and by virtue of the laws of the State of Nevada, and engaged in, and authorized to do business within, the State of California.

2. The evidence does not prove or show that the corporation plaintiff, at the time of bringing this action, and prior thereto, was, and now is, in charge of a public use, and public uses, as set forth in Finding III of said Court, and more particularly over and through section 16, township 1 North, Range 25 East, Mt. Diablo Meridian, or that said land is a necessary or public use, or is necessary for such use by the plaintiff herein for the purposes and public uses in paragraph III of said Findings particularly mentioned and set out.

3. The evidence does not prove or show what parts or that any parts of said land are peculiarly adapted for the purposes of
62 irrigation in affording a place and places therein for the construction and maintenance of dams, reservoirs, tunnels, levees,

viaducts, embankments, excavations, and the sites thereof for the irrigation of adjoining, and other lands, or of ditches, pipes, and flumes for the collection, storage, selling and distribution of water, or that parts of said section are adapted for the construction and maintenance of oil pipe lines for the transportation of petroleum, and other mineral oils, or that other parts of said section are peculiarly adapted for the construction and maintenance of electrical power plants and electric heat and power lines for the purpose of marketing, selling, furnishing, and transporting light, power, and heat.

4. The evidence does not prove or show that because of the inclemency of the weather at and in the neighborhood of said tract of land during the winter months of each year duplicate systems of ditches, flumes, pipe lines, and electric light, heat, and power lines in different parts of said section are and will be necessary to insure uninterrupted service of water and electric light power and heat, and preserve the adaptability of the oil pipe lines therein for the purposes for which they are constructed, or that the whole of said section 16, township 1 North, Range 25 East, Mt. Diablo Meridian is
63 necessary for said public use and uses mentioned and set out in said Finding.

5. The evidence does not prove or show that the location of said tract of land by the plaintiff for such necessary public use was and is made in the manner which is most compatible with the greatest public good and the least private injury.

6. The evidence does not prove or show that no part of said land has heretofore been appropriated to any public use.

7. The evidence does not prove or show that on the 23rd day of June, 1911, the actual value of said tract of land was One dollar for each acre therein contained.

Specifications of Errors of Law.

The defendant the State of California now specifies the following errors of law occurring at the trial of this cause, and excepted to by the defendant, on which the defendant will rely:

1. The court erred in overruling the objection of the defendant to the introduction in evidence on behalf of the plaintiff of the articles of incorporation of the plaintiff, marked "Plaintiff's Exhibit 1." (See defendant's Exception No. 1.)

64 2. The court erred in overruling the objection of the defendant to the introduction in evidence on behalf of the plaintiff of the certificate of Secretary of State of the State of Nevada, marked "Plaintiff's Exhibit II." (See defendant's Exception No. 2.)

3. The court erred in overruling the objection of the defendant to the introduction in evidence on behalf of the plaintiff of the resolution passed by the corporation plaintiff, through its directors, and marked "Plaintiff's Exhibit No. III." (See defendant's exception No. 3.)

4. The court erred in overruling the objection of the defendant to

the introduction in evidence on behalf of the plaintiff of the agreement between the Deseret Water, Oil and Irrigation Company and A. M. Gillespie, marked "Plaintiff's Exhibit No. IV." (See defendant's exception No. 4.)

5. The court erred in overruling motion for a judgment of nonsuit specified as "Defendant's Exception No. 5."

The foregoing Bill of Exceptions was duly served within the time allowed by law, and the stipulation of the parties, by the defendant, The State of California, as its bill of exceptions to be used
65 on appeal from the judgment and on a motion for a new trial thereof, and the same may be settled.

A. H. RICKETTS,
Attorney for Plaintiff.
U. S. WEBB,
Attorney General, Attorney for Defendant, State of California.

The foregoing is hereby certified, settled and allowed as the Bill of Exceptions of the defendant, State of California, to be used on appeal from the judgment and on the motion for a new trial in said action.

Dated: February 21st, 1912.

WM. S. WELLS,
Judge of Said Court Before Whom Said Action was Tried.

Filed Feb. 27th, 1912.

[Title of Court and Cause.]

To the plaintiff, Deseret Water, Oil, and Irrigation Company, a corporation, and A. H. Ricketts, its attorney, and to the Clerk of the above entitled court:

You, and each of you, will please take notice, that the defendant, the State of California, does by this notice appeal to the District Court of Appeal of the State of California, in and for the
66 Third Appellate District, from the judgment made and entered in the above entitled action in favor of the above named plaintiff and against the above named defendant, and from the whole thereof.

Dated: March 2, 1912.

U. S. WEBB,
Attorney General, Attorney for Defendant, State of California.

Served March 2nd, 1912, and filed March 5th, 1912.

[Title of Court and Cause.]

Bill of Exceptions on Order Refusing a New Trial.

Be it remembered that, heretofore on the 5th day of March, 1912, the above named defendant, the State of California, pursuant to

notice heretofore on the 22nd day of January, 1912, given, which said notice duly given, served and filed is as follows:

"(Title of Court and Cause.)

To Deseret Water, Oil, and Irrigation Company, a corporation, plaintiff, and to its attorney, A. H. Ricketts, Esq., and to the Clerk of said Superior Court:

You are hereby notified that the defendant, the State of
67 California, intends to move said court to vacate its decision herein, and to grant a new trial of this action, on the following grounds:

First. Insufficiency of the evidence to justify the decision.

Second. That the decision is against law.

Third. Errors in law occurring at the trial and excepted to by the defendant.

Said motion will be made on a bill of exceptions to be hereafter prepared, served, and filed.

U. S. WEBB,
Attorney General of the State of California,
Attorney for Defendant, State of California."

Moved the above entitled court for an order granting said defendant a new trial in said cause, which motion is as follows:

"Now comes the defendant, the State of California, and moves said Court for a new trial of this cause upon the following grounds, to wit:

First. That the evidence is insufficient to justify the decision of the court in favor of plaintiff;

Second. The decision is against law;

Third. On account of errors of law occurring at the trial and excepted to by this defendant.

This motion is made and is based upon the judgment roll in said action, and upon the bill of exceptions heretofore on the 27th
68 day of February, 1912, served, settled and filed herein and which is now among the papers in said action."

That said motion for a new trial so made was presented to this Court upon said Bill of Exceptions and upon said Judgment Roll, and that upon said motion said Bill of Exceptions and said Judgment Roll were the only papers or evidence used or taken on the hearing of said motion for a new trial, and upon these said motion was submitted to the Court for decision.

That heretofore, on the 5th day of March, 1912, said Court having fully considered said motion, duly made and caused to be entered its order denying a new trial of said cause, which said order is as follows, to wit:

"The motion of the defendant, the State of California, for a new trial in the above entitled action having been heretofore presented and submitted to the Court and the same having been duly considered,

It is ordered that said motion be, and the same is hereby denied."

To said order an exception was duly taken by the defendant, the State of California, and upon request of defendant, defendant was allowed ten days within which to present, serve and file a Bill of Exceptions.

69 Now comes the defendant, the State of California, above named, and presents the foregoing as its Bill of Exceptions and asks that the same may be settled and allowed by the above entitled Court.

U. S. WEBB,
Attorney General of the State of California,
Attorney for Defendant, State of California.

Dated: March 5th, 1912.

The foregoing bill of exceptions is correct and may be settled and allowed by the Court.

A. H. RICKETTS,
Attorney for Plaintiff.
U. S. WEBB,
Attorney General of the State of California, Attorney for Defendant, the State of California.

Dated: March 5th, 1912.

The foregoing bill of exceptions presented by the defendant therein named is hereby settled, allowed, approved and certified to be correct this 5th day of March, 1912.

WM. S. WELLS,
Judge Who Presided at the Trial of Said Cause and Heard Said Motion.

Filed March 8th, 1912.

70 [Title of Court and Cause.]

Notice of Appeal from Order Denying Motion for a New Tril.

To the above named plaintiff and A. H. Ricketts, its attorney, and to the Clerk of the above entitled Court:

You, and each of you, will please take notice that the defendant, The State of California, does, by this notice, appeal to the Honorable District Court of Appeal of the State of California, in and for the Third Appellate District, from the order of the above entitled court, refusing a new trial of the above entitled action, and denying said defendant's motion for a new trial made and entered on the 5th day of March, 1912.

U. S. WEBB,
Attorney General of the State of California, Attorney for Defendant, the State of California.

Duly served March 5th, 1912, and filed March 8th, 1912.

71–74 *Stipulation to Transcript.*

It is hereby stipulated that the foregoing transcript on appeal contains full, true and correct copies of the documents therein set forth, as shown by the files of said case in the office of the County Clerk of the County of Mono, State of California, and that the same shall constitute the transcript on appeal of said case, both on the appeal from the judgment and on the appeal from the order denying a new trial, and that said appeals may be heard together on one transcript.

A. H. RICKETTS,
Attorney for Respondent.
U. S. WEBB,
Attorney General of the State of California,
Attorney for Appellant.

No. —.

75 In the Supreme Court of the State of California, Third Appellate District.

No. 972.

DESERET WATER, OIL AND IRRIGATION COMPANY, a Corporation, Plaintiff and Respondent,
vs.
THE STATE OF CALIFORNIA, Defendant and Appellant.

Application for Hearing and Determination of Cause by Supreme Court After Decision of District Court of Appeal.

A. H. Ricketts, Attorney for Defendant and Respondent.
Metson, Drew & Mackenzie, of Counsel.

Filed this — day of January, A. D. 1913. B. Grant Taylor, Clerk, by —— ——, Deputy Clerk.

76 *Summary.*

We attempt to show in this petition that:

1. Section 3408*b*, Political Code, on which decision District Court of Appeal is based, has been repealed.

2. Under the Acts of Congress and unanimous authorities Section 3408*b* can have no application to school lands surveyed prior to creation of Forest Reserve; because such lands are not lost to the State, and indemnity selections are, under the law, under the definition of the word and in the nature of things, predicated solely upon loss of a portion of the School Grant.

3. There is no warrant for construing Section 3408*b* of the Political Code as by implication repealing the eminent domain Act as to State lands. C. C. P., Sec. 1240.

4. There is no warrant for holding that United States should have been a party defendant, because: the law forbids the suing of the United States; defendant could not and certainly the Court can not raise the point; the record shows the United States to be without any interest whatever in the lands; the judgment concerns only the title of the State; the United States could not be prejudiced by or interested in the judgment even if it had an interest in the land; eminent domain never falls for failure to bring in outstanding title of third party; the United States could not have any interest in the lands, because there is no authority in law for basing any selection thereon or relinquishing or transferring the same to the United States, by selection, exchange or otherwise.

5. The decision below is in conflict with our Supreme Court and the highest courts of other States upon at least four salient points.

77 In the Supreme Court of the State of California, Third Appellate District.

No. 972.

DESERET WATER, OIL AND IRRIGATION COMPANY, a Corporation, Plaintiff and Respondent,

vs.

THE STATE OF CALIFORNIA, Defendant and Appellant.

Application for Hearing and Determination of Cause by Supreme Court After Decision of District Court of Appeal.

To the Honorable the Supreme Court of the State of California:

Deseret Company, plaintiff and respondent in the above entitled action, and petitioner herein, respectfully petitions your
78 Honorable Court to grant a hearing by the Supreme Court of the above entitled cause upon the decision of the District Court of Appeal in and for the Third Appellate District of the State of California, after decision rendered therein; the said decision having been rendered on the 26th day of November, 1912, and having become final on the 26th day of December, 1912, by the terms of which decision the judgment theretofore rendered by the Superior Court of the State of California in and for the County of Mono, in favor of said plaintiff and against said defendant, and the order of said Superior Court denying said defendant's motion for a new trial of said action were reversed.

A copy of the opinion of the said District Court of Appeal is attached hereto, as Exhibit A.

This is an action to condemn a certain Section 16, the property of the State of California under the School Land Grant. Judgment was entered in the trial court in favor of plaintiff, condemning the land in question to the public use set forth in the complaint, viz: The storing of water, etc., incident to the hydro-electric business in

which plaintiff is engaged. The only defense treated of in
79 the Court's opinion is based upon the following allegation in the Answer, viz:

"The land described in plaintiff's complaint is surveyed land and is wholly situate within the exterior boundaries of a permanent reservation."

The reversal of the trial court is based upon the theory that the United States should have been made a party and that said Section 16, being surrounded by lands in a National Forest Reserve (i. e., a permanent reservation), was withdrawn from eminent domain proceedings by virtue of the provisions of Section 3408*b* of the Political Code. The portion of Section 3408*b* relied on in the Court's opinion is as follows:

* * * "All sixteenth and thirty-sixth sections, both surveyed and unsurveyed, which may now or may hereafter be included within the exterior boundaries of a national reservation, or of a reserve, or within the exterior boundaries of lands withdrawn from public entry, shall be and are hereby withheld from sale by the State, and the same shall hereafter be *used only as bases for indemnity selections* as in this article provided." * * * (Italics ours.)

80 The Court of Appeal holds:

1. That the foregoing portion of said Code Section in providing that lands belonging to the State surrounded by Forest Reserve "shall hereafter be used only as bases for indemnity selections," as to such lands, completely emasculates the general law on eminent domain, C. C. P., Sec. 1240, i. e., by implication repeals the eminent domain law as to lands of the State so situated.

2. That in any event the United States is a necessary party, on account of certain so-called indemnity selections having been attempted to be made based upon the supposed authority of the above quoted portion of said Section of the Political Code.

I.

It is to be particularly noted that the lands involved herein were identified by survey before creation of the Forest Reserve; title accordingly having theretofore fully vested in the State, as shown by authorities quoted below.

The State's ownership of the lands is admitted by the pleadings.

As to school or any lands to which the State has acquired title the provisions of Section 3408*b* of the Political Code with refer-
81 ence to use as bases for indemnity selections, if in terms applicable to such lands, are utterly abortive. No land owned by the State can form the basis for any indemnity selection of United States lands by or on behalf of the State. This has been conclusively adjudicated by the authorities we cite later. But it is obviously an incontestable truth founded in the nature of things. Indemnity selections are predicated upon loss to the State of a portion of the School Grant. There can be no indemnity for what the State actually does receive. Indemnity must be for something lost, not had and held. Hence, if Section 3408*b* is in terms applicable to

school sections owned by the State and provides for their use as bases of indemnity selections, then the use prescribed is one impossible of fulfillment; and in this application the Code section is resolved into mere jargon. Its provisions as to the use to which the land is to be devoted become utterly futile and meaningless. Accordingly all argument that eminent domain proceedings are withdrawn, as to lands owned by the State, by authority of said section, resolves itself into the contention that use for eminent domain purposes shall not be permitted because it would interfere with a use which under
82 the authorities is not and in the nature of things cannot be a use of which the property is or ever can be susceptible.

We hereafter cite the authorities and further develop the foregoing points. We also later cite authorities showing that the very provisions of Section 3408*b* to the effect that such lands "shall be used only as bases for indemnity selections" have been repealed by a later enactment of the Legislature. However, even assuming for the purpose of argument that said provisions of said Section are still in effect and that the lands in question are in law and fact susceptible of the use named in Section 3408*b*, we most strenuously contend that there is no warrant for construing such provisions as prescribing a use exclusive of eminent domain.

Section 1240 of the Code of Civil Procedure provides that lands belonging to the State of California "not appropriated to some public use," shall be subject to eminent domain.

Section 3408*b* of the Political Code must be construed in connection with this section and if possible effect be given to the provisions as to eminent domain. There is no express repeal of Section 1240 of the Code of Civil Procedure. If the eminent domain Act is repealed it is by implication only. Repeal by implication involves necessary implication.
83 Not only is such implication not necessary but it is not even indicated. Section 1240 of the Code of Civil Procedure does more than state generally that the land of the State shall be subject to eminent domain. If it stopped at that it might carry the implied proviso, "unless by law otherwise employed or disposed of," which would render the section controlled by legislation making specific provision for disposition or employment. But the section proceeds to specify the class of cases in which eminent domain will not lie in the event of specific provisions as to use viz: When State land is appropriated to a public use. The expression of one being the exclusion of the others, it is as though the section expressly provided that eminent domain will lie in spite of legislation making specific provision as to the disposition or employment of a certain class of State lands unless such legislation devotes the land to a "public use." What public use? Evidently that of the State of California, not to the public use of the United States. In the phrase "shall be used only as bases, etc.," the word "used" is obviously not employed in the sense in which it is employed in the phrase "public use." The latter obviously means "occupancy or enjoyment for State public purposes," whereas in the phrase "shall be used only as bases,
84 etc.," the word concerns only the disposing of the property. Certainly State property is not devoted to a State public use

when sold or traded away. And that is all that Section 3408*b* of the Political Code is concerned with. At most the section says that lands in question shall be disposed of only in a certain way. The subject matter being dealt with in Section 3408*b* is the voluntary disposing of State property by the State acting as the proprietor of lands belonging to the State. The statement in this section of an exclusive method of voluntary disposing of lands by the State as proprietor certainly will not nullify the Act of the State as sovereign in delegating to private persons the right to exercise eminent domain and thus bring about an involuntary ceding of its property on the part of the State. The exclusiveness of Section 3408*b* concerns only the subject matter dealt with, viz: the State's commands and directions, through the Legislature, to its officers as to what their functions and duties are in disposing of and realizing upon State land. It certainly cannot be contended that provision for the sale of State lands constitutes a devotement of the same to a "public use" so as to preclude eminent domain. And yet every statute providing for the sale of State lands at a fixed price in effect provides for an exclusive
85 method of disposing of such lands. A statute declaring that lands shall be sold for $1.25 per acre, means that the lands shall be only sold i. e. not leased or traded or given away; and that they shall be sold only for $1.25 no more and not less. Accordingly it is apparent that if Section 3408*b* is to be held as suspending eminent domain, then any statute providing for the voluntary disposition of State lands by sale or otherwise would suspend eminent domain. The conclusion from which would be that eminent domain would apply only to lands as to which the State stood entirely neutral, which would mean that all acts of the State as proprietor of its lands would constitute a devotement of the same to a "public use;" an obvious reductio ad absurdum.

Irrespective of the foregoing reasoning we submit that eminent domain being a delegation of the sovereign authority of the State based upon public necessity and policy founded upon the common good and the particular exigencies existing as to particular lands will not be held to be suspended unless such intention appears clearly and unmistakably.

"Eminent domain is the power to appropriate individual property as the public necessities require and which pertains to
86 sovereignty as a necessary, constant and inextinguishable attribute."

Lewis 2nd Ed., Sec. 3, p. 9.

"Eminent domain is the right of the people or the government to take private property for public use."

C. C. P., Sec. 1237.

"The private property which may be taken under this title includes:

"1. * * *

"2. Lands belonging to this State * * * not appropriated to some public use."

C. C. P., Sec. 1240.

State lands are classified with lands held by individuals as "private property" and the State in its office of proprietor of the lands owned by it becomes no more than any other individual land owner. The State in the exercise of its attribute or office of sovereignty has expressly subjected the lands held by it as proprietor to the requirements of public use and convenience as defined in C. C. P., Sec. 1238.

Such is the fixed status of all State lands and of the particular section of State School Land here in question, unless there
87 shall be found within the four corners of the Thompson Act and acts amendatory thereof a clear legislative intent to change or vary that status as to sixteens and thirty-sixes that have been reserve-locked subsequent to survey.

By express terms the State's sovereignty has fastened upon all State lands not appropriated to a "public use" by the State for the potential purpose of their occupation and employment for public benefit. This declared sovereign right has been delegated to whomsoever shall invoke it for the uses named. Irrespective of the delegate seeking to exercise it the right of eminent domain is provided in the interest and for the benefit of the public. In last analysis the exercise of the right is by the State in the interest of the State. It is no more than sovereignty working out government. In a broad sense it is sovereignty at work in an effort to keep pace with progress and insure its benefits to all localities. And so it must be said to be in the nature of a grant to and compact with the inhabitants of the State that mere ownership by the State of the lands within its borders or any Acts of the State as proprietor not constituting a devotement of the lands to a "public use" shall not stand in the way of progress or development or the highest
88 general good embraced within the public uses specified in C. C. P., Sec. 1238.

It is true that the sovereignty of the State speaks and speaks only through legislative enactment. But where so important and necessary a function of sovereignty is at work under express enactment and there has thereby and thereunder arisen a covenant if not a grant in which all of the people of the State are interested can anything less than express enactment effect an abrogation of that public right?

Speaking to this point the Supreme Court of Illinois in Ill. & Mich. Canal vs. C. R. I. R. R. Co., 14 Ill., 314, 318, held that the right of eminent domain, like that of taxation, extended to all lands within the State unless expressly relinquished. To the same effect it is said by Sutherland in his work on his statutory construction (Second Ed.) Section 548, that it is never to be implied that the State has surrendered its sovereign power of police, taxation or eminent domain. The reason for the ruling requiring express abrogation and rejecting any implication of such surrender is doubtless to be found in the consideration of the high necessity of the exercise of those fundamental functions of sovereignty to government itself as well as the common good.

89 Section 3048*b* Political Code as to any attempted exclusive devotement of school lands belonging to California for use as bases for indemnity selections was repealed by the act of May 1, 1911.

We again quote the pertinent portion of Section 3408*b*, which section was added to the Political Code in the session of 1909.

"* * * All sixteenth and thirty-sixth sections, both surveyed and unsurveyed, which may now or may hereafter be included within the exterior boundaries of a national reservation, or of a reserve, or within the exterior boundaries of lands withdrawn from public entry, shall be and are hereby withheld from sale by the State, and the same shall hereafter be used only as bases for indemnity selections as in this articles provided. * * *"

The Act of May 1, 1911 (Statutes of 1911, page 1408), so far as in point, reads as follows:

"SECTION 1. All sixteenth and thirty-sixth sections of school land belonging to the State of California and situated within the exterior boundaries of a military, Indian or forest reservation created by authority of the United States, or of a national forest, national park, or national monument, or within the exterior boundaries of
90 lands withdrawn from public entry for forest purposes, are hereby withdrawn from sale by the State of California.

* * * * * * *

"SEC. 3. Nothing in this act contained shall be construed as preventing the use of said sixteenth and thirty-sixth sections as bases for indemnity selections, as provided by law, and likewise, nothing in this Act contained shall be construed as a recognition that prior to the passage hereof the said sixteenth and thirty-sixth sections, in section one hereof referred to, have not heretofore been withdrawn from sale by the State.

"SEC. 4. All Acts or parts of Acts in conflict with this Act are hereby repealed."

It will be observed that Section 1 of the Act of May 1, 1911, re-enacts the above quoted portion of Political Code Section 3408*b*, omitting, however, the provision "shall be used only as bases for indemnity selections." Section 3408*b* withdraws the lands from sale to be held for a specific purpose. The later Act of May 1, 1911, withdraws the land from sale generally and without reference to their being held for any specific purpose. This certainly amounts to a repeal as to the lands, upon withdrawal, being held for such or any specific purpose. If this is not the correct construction then
91 the Legislature did a vain and idle thing in re-enacting in the Act of May 1, 1911, the portion of Section 3408*b* withholding the lands in question from sale. The subject matter of the two Acts is the same. To the first enactment is attached a limiting purpose. The omission of such limiting purpose from the second enactment is a negation thereof. This construction was evidently recognized by the Legislature, in providing in Section 3 of the Act of May 1, 1911:

"SEC. 3. Nothing in this Act contained shall be construed as preventing the use of said sixteenth and thirty-sixth sections as bases for indemnity selections, as provided by law. * * *"

In this we have conclusive evidence that the omission of the pro-

vision in Section 3408*b* as to the land being used only as bases for indemnity selections was studied and advised; a recognition that the omission of said provisions from the second enactment would not only do away with the exclusive devotement to indemnity selections but would even indicate a purpose to forbid such selections; and the intention of the Legislature that this effect of forbidding such selections should not result. The Legislature says that the Act shall not prevent use of school lands for indemnity selections; that is
92 that such use is to be permitted. Such provision is absolutely inconsistent with the theory that Section 3408*b* remains in force as to requiring such use and such use only. If the omitted portion of Section 3408*b* has not been repealed then the Legislature in the later Act has declared to be permitted that which under the code section is exclusively required.

Now, to revert to the proposition that in any event, Section 3408*b* has no force or effect as to surveyed lands belonging to the State prior to creation of Forest Reserve, because such lands are not under the law subject to or in fact susceptible of use as base for indemnity selections.

Lands embraced within the School Land Grant (Act of Congress, March 5, 1853), have never been recognized by Congress as bases for any selection or receiving of lieu or other lands by the State except as bases for indemnity selections for loss of a portion of the grant, i. e., where through being mineral, subject to homestead entries, being unsurveyed and unidentified before creation of Forest Reserve, etc., it never vested in the State.

The Acts of Congress, at which the provisions of Section 3408*b* and its correlated sections of the Political Code known as the Thompson Act passed in 1909 are aimed, are Revised Statutes Sections
93 2275 and 2276 as amended by Act of February 28th, 1891. These are the only Acts of Congress authorizing any selections whatever as to school land granted to the State.

Said Revised Statutes, as amended in 1891, are as follows:

"SEC. 2275. Where settlements with a view to pre-emption or homestead have been, or shall hereafter be made, before the survey of the lands in the field, which are found to have been made on sections sixteen or thirty-six, those sections shall be subject to the claims of such settlers; and if such sections, or either of them, have been or shall be granted, reserved, or pledged for the use of schools or colleges in the State or Territory in which they lie, other lands of equal acreage are hereby appropriated and granted, and may be selected by said State or Territory, in lieu of such as may be thus taken by preemption of homestead settlers. And other lands of equal acreage are also hereby appropriated and granted, and may be selected by said State or Territory where sections sixteen or thirty-six are mineral land, or are included within any Indian, military, or other reservation, or are otherwise disposed of by the United States; Provided, where any State is entitled to said sections sixteen and thirty-six, or where said sections are reserved to any Territory, notwithstanding the same may
94 be mineral land or embraced within a military, Indian, or other reservation, the selection of such lands in lieu thereof

by said State or Territory shall be a waiver of its right to said sections. And other lands of equal acreage are also hereby appropriated and granted, and may be selected by said State or Territory to compensate deficiencies for school purposes, where sections sixteen or thirty-six are fractional in quantity, or where one or both are wanting by reason of the township being fractional, or from any natural cause whatever. And it shall be the duty of the Secretary of the Interior, without awaiting the extension of the public surveys, to ascertain and determine, by protraction or otherwise, the number of townships that will be included within such Indian, military, or other reservations, and thereupon the State or Territory shall be entitled to select indemnity lands to the extent of two sections for each of said townships, in lieu of sections sixteen and thirty-six therein; but such selections may not be made within the boundaries of said reservation; Provided, however, that nothing herein contained shall prevent any State or Territory from awaiting the extinguishment of any such military, Indian, or other reservation and the restoration of the lands therein embraced to the public domain and then taking the sections
95 sixteen or thirty-six in place there*in;* but nothing in this proviso shall be construed as conferring any right not now existing.

"SEC. 2276. That the lands appropriated by the preceding section shall be selected from any unappropriated, surveyed public lands, not mineral in character, within the State or Territory where such losses or deficiencies of school sections occur; and where the selections are to compensate for deficiencies of school lands in fractional townships, such selections shall be made in accordance with the following principles of adjustment, to wit; for each township, or fractional township, containing a greater quantity of land than three-quarters of an entire township, one section; for a fractional township, containing a greater quantity of land than one-half, and not more than three-quarters of a township, three-quarters of a section; for a fractional township, containing a greater quantity of land than one quarter, and not more than one-half of a township, one-half section; and for a fractional township, containing a greater quantity of land than one entire section, and not more than one-quarter of a township, one-quarter section of land; Provided, that the States or Territories which are, or shall be entitled to both the sixteenth and thirty-sixth sections in place, shall have the right to select double the amounts named, to compensate for deficiences of school land in fractional townships."

96 The title to lands embraced within the School Grant passes to the State upon identification by survey.

Heydenfeldt vs. Mining Co., 93 U. S., 634;
Cooper vs. Roberts, 18 How., 173;
Hibberd vs. Slack, 84 Fed., 571;
Slade vs. Butte Co., 112 Pac., 485.

There can be no indemnity or other selection based upon school land, title to which vests in the State. The only selections authorized by Congress are predicated upon a portion of the School Grant being lost to the State.

The case of Hibberd vs. Slack, 84 Fed., 571, is directly in point as to every phase of this question: and is directly in point as it concerns school lands surveyed prior to being surrounded by Forest Reserve.

The Court in that case states the question to be adjudicated as follows:

"These pleadings raise the following question of law, to wit: Is the State of California entitled to select other lands, in lieu of the sixteenth and thirty-sixth sections of school lands, situated within the exterior boundaries of a public reservation, where said sections were surveyed and became the property of the State, prior to the date when the reservation was created?"

97 In determining this query, unqualifiedly in the negative, the Court says:

"Plaintiff contends that said Act of February 28, 1891, so far as concerns the appropriation to and selection by a State of lands of equal acreage, in lieu of Sections 16 and 36, included within a reservation, provides for two things: First, indemnity to said state for such of said sections as, before their surveys in the field, are included within a reservation, and thereby lost to the State; second, a plan by which the State may transfer or relinquish Sections 16 and 36, after its ownership has become absolute by surveys in the field, to the United States, and obtain therefor other lands of equal acreage, where, subsequent to such surveys, a reservation has been created, whose exterior boundaries include said sections; this plan being, not a grant of lieu lands to compensate losses in school sections, but an exchange between the Federal and State Governments of lands which belong, respectively, to each. Defendant concedes the indemnity feature, as I have above distinguished it, of the Acts, but denies that said Act gives to the State the right to select lands of equal acreage with the school sections, where the latter are included within the exterior boundaries of a reservation, subsequent to their survey in the field; that is, denies that the Act provides for any exchange

98 of lands between the Federal and State Governments. In a decision dated December 27, 1894, the then Secretary of the Interior, Hon. Hoke Smith, decided the precise question here involved adversely to plaintiff's contention. In re California, 19 Land Dec. Dept. Int., 585. Principles, however, contrary to those upon which that decision was based have been subsequently applied, by the present Secretary of the Interior, in a decision bearing date January 8, 1897.

"My opinion, after a careful consideration of the subject, is that plaintiff's construction of the Act of February 28, 1891, so far as relates to an exchange of lands, can not be maintained, although the reasons which have led me to this conclusion are different from those on which Secretary Smith rested his decision.

"In construing the Act of February 28, 1891, there are certain well-established principles of law, applicable to school sections, which should be constantly borne in mind, as follows: First, Title to a school section, if unincumbered at date of survey, then vests absolutely in the State. Cooper vs. Roberts, 18 How., 173; Heydenfeldt vs. Mining Co., 93 U. S., 634. And this is the principle recognized

and acted upon by the Department of the Interior. In re Colorado, 6 Land Dec. Dept. Int., 412; In re Virginia Lode, 7 Land Dec. Dept. Int., 459; In re Miner, 9 Land Dec. Dept. Int., 408; Pereira
99 vs. Jacks, 15 Land Dec. Dept. Int., 273. After title has thus vested, the section is not subject to any further legislation by Congress. Therefore the school sections which were the bases of the selections of the lands sued for in the case at bar, although situated within the limits of forest reservations, are not parts of such reservations. Wilcox vs. Jackson, 13 Pet., 513; Railroad Co. vs. Whitney, 132 U. S., 357, 10 Sup. Ct., 112. Second, Until the surveys in the field of the school sections, to wit, 16 and 36, the United States has full power of disposition over them; and, by the exercise of this power, said sections may be lost to the State. Hence, and through various enactments of Congress, has arisen the law of indemnity, whose cardinal doctrine is compensation for loss. Thus, it has been said, 'the principle upon which indemnity is given to a State is for a loss. It is not given for that which the State has already received.' Poisal vs. Fitzgerald, 15 Land Dec. Dept. Int., 19.

"Plaintiff concedes, in his brief, that up to the Act of February 28, 1891, compensation for loss was the only theory on which a State could acquire other lands in lieu of school sections, but contends that said Act introduced a new arrangement—'a statutory expedient'—for an exchange of properties between the United States and a State, whereby the former could reacquire Sections 16 and 36 after
100 they had vested in the State; such expedient being not only 'novel,' but 'contrary to the old maxim of indemnity law that indemnity is not allowed except for losses.'"

The Court proceeds at length to consider all contentions of plaintiff to the effect that an indemnity selection concerns not only loss to the State, but contemplates an actual exchange of land owned by the State for lands of the United States. All of such contentions are held to be without any support under said or any Act of Congress.

Similarly in Slade vs. Butte County, 112 Pac., 485 (Court of Appeal, Third District, California), the Court says:

"By Act February 26, 1859, c. 59, 11 Stat., 385, the United States appropriated other lands of like quantity in lieu of the sixteenth and thirty-sixth sections or fraction thereof, granted to a State, where loss to the State in which the lands lie, by reason of having previously been settled upon 'with a view to pre-emption.' Subsequent statutes made like provision where the loss was by reason of settlement with a view to homestead, or where the lands are mineral, or are included within an Indian, military, or other reservation, or are otherwise disposed of by the United States.' See Act Feb. 28, 1891, c.
101 384, 26 Stat. 793 (U. S. Comp. St. 1901, pp. 2275, 2276). The Act appropriates and grants lands in lieu of the sixteenth and thirty-sixth sections so lost to the State, and provides that other lands of equal acreage 'may be selected by said State or Territory in which they lie.' Obviously, no title passed of these so-called lieu lands by virtue of the statute alone, i. e., it was not a grant in præsenti, as was the grant of the school lands (sixteenth and thirty-sixth sections, in place). The statute looked to possible losses to the State and pro-

vided that, when such losses were ascertained and locations or selections were made by the State, the Government would, if the land selected were unoccupied public land subject to such location, approve such selection and so officially inform the State, and thereupon title would vest in it, and patent would issue by the State to the locator."

Similarly in Johnson vs. Morris, 72 Fed., 890, the Court says:

"The Secretary held that California took her school grant under Section 6 of the Act of March 3, 1853, and Section 6 of the Act of July 23, 1866, and that the indemnity provision of Section 2275 of the Revised Statutes, as amended, was not applicable to selections made by the State in lieu of the swamp land lost from the school land grant, on the ground that it would be giving to the State
102 an indemnity for a class of lands already donated to the State; and that the principle upon which indemnity is given to the State is for a loss, and not for that which the State has already received. This is a clear and forcible statement of the reason why the State is not entitled to make indemnity selections for school lands which it had already received as swamp lands, but this reason does not apply to losses from the school grant by reason of Sections 16 and 36 being mineral lands."

We therefore submit that under the foregoing authorities it is conclusively established:

1. That title to school sections vests absolutely in the State upon survey.

2. Subsequent inclusion of such lands in Forest Reserve does not in any way affect the title of the State.

3. The State suffers no loss as to the School Grant lands by subsequent creation of surrounding Forest Reserve.

4. Indemnity selections are under said Revised Statutes and the authorities so hold and in the nature of things it must be that they be predicated solely upon loss to the State.

5. The State can under present or any subsequent Acts of
103 Congress receive no indemnity for or based upon school or any lands to which it obtains title.

As a matter of fact, from time to time, the officers of the Department of the Interior as a "legal expedient" and without any authority or power whatever have held that indemnity selections comprise not only compensation for loss but also an actual exchange of lands between the State and the United States. There is not under any Act of Congress or any single decision the slightest support under the law for this position. And it is in fact contrary to other rulings of the officers of the Department. It can be explained only as a manifestation of the "progressive" spirit shown by a certain class of officials who appear to be obsessed with the idea that under the banner of conservation they are justified in overriding the law of the land, and flaunting their disrespect in the face of judges.

The provisions of Section 3408*b* of the Political Code to the effect that all surveyed school sections belonging to the State within the exterior boundaries of a National Reservation shall be used only as

bases for indemnity selections are not in terms absolute or unqualified.

They must be read in connection with the provisions of
104 Section 3408c of the Political Code passed at the same time and in the same Act as follows:

"* * * In determining the bases in lieu of which the State is entitled to indemnity, the Surveyor-General shall also include all sixteenth and thirty-sixth sections which were surveyed at the time of the withdrawal of such lands from public entry, or at any time thereafter; provided, however, that should the land department of the United States determine that such surveyed sections are improper or invalid bases, then the Surveyor-General shall not be required thereafter to consider or treat said surveyed sections as valid or any bases for indemnity selections." * * *

Here we have a provision qualifying the devotement of such lands for use as indemnity base. The terms of Section 3408*b* are expressly conditioned upon the happening of a contingency. The devotement of such surveyed sections to use as indemnity base are to have force and effect only in case the Land Department of the United States shall not determine that such surveyed sections are improper or invalid bases for indemnity selections. Obviously the determination of the Land Department on this question must be consistent with the power and jurisdiction of the officials in that regard. The
105 foregoing authorities show that it is beyond the power and jurisdiction of the Land Department to hold on this question in any way other than to determine that surveyed sections afterwards surrounded by Forest Reserve are not proper or any valid bases for indemnity selections. Which means that in the eye of the law the Land Department has so held, for the reason that it has no power or jurisdiction to hold otherwise. Therefore it is apparent that the contingency has arisen, upon the happening of which, by the terms of said sections of the Political Code, such surveyed sections surrounded by Forest Reserve are not to be used as base for indemnity selections, viz: Upon it being determined that under Congressional legislation and the power of the Land Department thereunder such sections are improper and invalid bases for indemnity. Accordingly the authorities above quoted, conclusively establishing the proposition that such surveyed sections are not proper bases for indemnity, do not contravene the terms of Section 3408*b* but simply show that such terms are by the very wording of the Code sections inapplicable to such lands because the event named in the above proviso as making the terms of such sections inapplicable to such surveyed lands has come about.

From t foregoing it is apparent that the opinion of the
106 District Court is based upon the construction of the Revised Statutes, Sections 2275-2276, as amended in 1891; that such construction is contrary to the plain and unmistakable meaning of such statutes; that if the opinion of the District Court of Appeal is to stand it will be opposed to the opinion of every court which has spoken on the matter and without any foundation whatever in the language of the Revised Statutes or otherwise under the law.

II.

The District Court of Appeal held in the present case contrary to the admissions in the pleadings and the proofs that it had the right to assume that the State of California was not the owner of the land.

The ownership by the State of the land sought to be condemned herein being a fact admitted by the pleadings there can be no presumption against the ascertained and established fact of such ownership.

Nieto vs. Carpenter, 21 Cal., 455.

When it is shown that certain property belongs to a par-
107 ticular person, the law presumes that the ownership remains unchanged until the contrary appears.

Kidder vs. Stevens, 60 Cal., 414.

See also:

Eltzroth vs. Ryan, 89 Cal., 135;
Hopenshell vs. So. Riverside etc. Co., 128 Cal., 631;
Fairbanks Morse Co. vs. Stock Food Co., 151 Mo. A., 264;
Lockwood vs Allen, 113 Wis., 478;
Jackson vs. Potter, 4 Wend., 673;
Code Civil Procedure, Sec. 1963, subd. 32.

It follows that when a particular status exists the law will presume its continuance and when it has been changed some evidence of that fact must be produced. Statutory divestiture of title does not depend upon the presumption that it has been divested and as the admission of ownership by the State was not changed by evidence or otherwise but was admitted the fact of ownership in the State was indisputable as to the case at bar.

III.

The District Court of Appeal erred in holding that "the United States is a necessary party to the final determination of the
108 case at bar and should be joined in the litigation." This ruling is contrary to law although it finds support in subdivision 9 of Section 1240 of the Code of Civil Procedure which provides that "lands belonging to the United States or owned or held by the United States in trust, or otherwise for any purpose except lands owned or held for lighthouses, postoffice or other government buildings, forts, arsenals, or other military purposes," are subject to the exercise of the right of eminent domain.

The United States can be sued for such cases and in such courts only as they have by act of Congress permitted.

Case vs. Terrell, 78 U. S., 199, 202;
Kawanankoa vs. Polybank, 205 U. S., 349;
Kansas vs. Colorado, 206 U. S., 46, 85;
Sawyer vs. Osterhaus, 195 Fed., 655.

It follows that no suit in rem can be maintained against the property of the United States where it would be necessary to take such property out of the possession of the Government by any writ or process of the court.

The Davis, 10 Wall., 15, 19;
Bulkley vs. U. S., 196 Fed., 429;
109 Oregon vs. U. S., 202 U. S., 60, following Minnesota vs. Hitchcock, 185 U. S., 373.

IV.

But, even if it be assumed for the sake of argument, that the United States is, or could be made a party to this litigation then the failure to make them a party therein is not essential and the Court in holding it necessary that they should be parties was in error.

Indiana, etc., Co. vs. Conniss, 184 Ill., 178.

This, because the rule is that the proceedings for condemnation is strictly between the plaintiff and the persons who are made parties to it. The omission of any owner of any estate in the land or of any person whose estate or interest is essential to a perfect and indefeasible title in the plaintiff will not invalidate the proceedings as against those who are made parties.

State vs. Easton etc. Co., 36 N. J. L., 184.

In Dowie vs. Chicago, W. & N. S. Ry. Co., 214 Ill., p. 49, the Court said:

110 "It is contended that Zion City, a municipal corporation, should have been made a party, and that, without having all the parties in interest before it, the court did not have jurisdiction to proceed and find appellant's damages." "No authority is cited upon this question except Sec. 2 (Hurd's Rev. St. 1903, p. 908, C. 47) of the Condemnation Act. This Section has been a number of times construed, and the holding of this Court has been uniformly adverse to the contention of the appellant. Bowman vs. Venice, etc., Ry. Co., 102 Ill., 459; Indiana, etc., Co. vs. Conniss, 184 Ill., 178."

But our own Supreme Court has spoken in the very recent case of San Joaquin & Kings River etc. Co. vs. Stevinson, 44 Cal. Dec., 594, and held that a proceeding in eminent domain is not a suit in equity to determine the title to the property involved, nor one in which a general adjudication of such title could be made. On the contrary that it is a special proceeding for a particular purpose, namely, to condemn the defendant's right for the benefit of the plaintiff as the purveyor of a public use. In such a controversy, third persons have no right to become parties to the condemnation proceedings. Nor, says the Court, in Alpers vs. Bliss, 145 Cal., 570, has a Court the right to interject outsiders into a controversy before it.

111 See also:

Wardlow vs. Middleton, 156 Cal., 505.

If the assumption of the District Court of Appeal that the title to the land in controversy in the case at bar is in the United States, then that title is necessarily adverse to the appellant herein and the Stevinson case overrules the Court of Appeal to the extent that the United States is a necessary party herein.

In International etc. Co. vs. Bruce, 194 U. S., 606, the Court held that the United States could not be made a party to a suit although it had a right in rem to the property involved in the action.

It follows that this inability to make the United States a party would defeat the statutory right of the plaintiff to exercise the right of eminent domain as to State school lands within a National Reserve.

It is respectfully submitted that the petition for rehearing of this cause in the Supreme Court should therefore be granted.

A. H. RICKETTS,
Attorney for Respondent and Petitioner.
METSON, DREW & MACKENZIE,
Of Counsel.

112 EXHIBIT A.

In the District Court of Appeal of the State of California in and for the Third Appellate District (Mono).

No. 972.

DESERET WATER, OIL AND IRRIGATION COMPANY, a Corporation, Plaintiff and Respondent,
vs.
THE STATE OF CALIFORNIA, Defendant and Appellant.

Filed Nov. 26, 1912.

This is an appeal from a judgment of condemnation and an order denying defendant's motion for a new trial. It was adjudged that "the plaintiff take and acquire and have for its own use in fee for "the purpose of preserving and maintaining water rights, water "sheds and sources, equipping, operating and maintaining canals, "laterals, aqueducts, flumes, tunnels, ditches, pipes and pipe lines "with all their appurtenances for supplying, selling and distributing "water power * * * and of constructing, equiping, operating and
"maintaining ditches, reservoirs, dams, tunnels, levees, via-
113 "ducts, bridges, embankments, excavations and the sites
"therefor, for the collection, storage, sale and distribution "of water, and for constructing, operating and maintaining pumps "and pumping plants, electric lighting and power plants, electric "and power lines, oil pipe lines, and all the necessary appurtenances "thereto, and for the generation and distribution of electric lights "and power," etc., the land in controversy consisting of section 16, T. 1 N., R. 25 E., M. D. M., containing 640 acres.

Among the defenses set out in the answer filed by the Attorney-General, it appears that "the land described in plaintiff's complaint "is surveyed land, and is wholly situate within the exterior bound-"aries of a permanent reservation." As to this, the testimony of the Deputy Surveyor-General is that "the lands in question were "withdrawn from sale by the State, by an Act of the Legislature, "and can only be used as basis for indemnity lieu selections. The "Surveyor-General offered all the lands as basis for indemnity "selections, except forty acres in the southeast quarter of the north-"east quarter, of which the State has sold an indemnity certificate, "entitling the purchaser to surrender that land and apply for un-
"appropriated public land in lieu of it. An indemnity
114 "certificate based on the southeast quarter of the northeast
"quarter of the land in controversy is still outstanding; has "not been used; as to the remainder of the land in controversy all "of it has been offered for indemnity selections which are pending "in the general land office. What we call scrip has been sold for "it, 640 acres. It was sold at public auction. There were several "different certificates. * * * I do not know that prior to any "of the sales that I have mentioned here as taking place in regard "to this section of land that the State of California has exhausted "its lieu rights. * * * The selections have been accepted, for "the most part, in the local United States land offices and sent on to "the general land office at Washington, where they are pending. "Simple acceptance or approval by the department at Washington "is all that is necessary to transfer title."

Subdivision 8 of Section 1240 of the Code of Civil Procedure provides that "Proceedings to condemn lands belonging to this State are hereby authorized" and, in subdivision three thereof are specified, as subject to condemnation, "Lands belonging to the United "States or owned or held by the United States in trust, or otherwise
"for any purpose except lands owned or held for light
115 "houses, post office or other Government buildings, forts,
"arsenals or other military purposes."

It is claimed, however, by appellant that the property involved herein has been withdrawn from the operation of eminent domain proceedings by virtue of Section 3408*b* of the Political Code, added by statutes of 1909, page 682, providing that "all sixteenth and "thirty-sixth sections, both surveyed and unsurveyed, which may "now or may hereafter be included within the exterior boundaries "of a National reservation, or of a reserve, or within the exterior "boundaries of lands withdrawn from public entry, shall be and "are hereby withheld from sale by the State, and the same shall "hereafter be used only as bases for indemnity selections as in this "article provided." This section, of course, must be construed in connection with the statutes in reference to eminent domain and, if possible, effect be given to all of the provisions. It is not easy to understand how the land can be used only as a basis for indemnity selection if it may be condemned for some other purpose. It is perfectly manifest that the sequestration of it for one use only is

entirely exclusive of all other uses. The policy of the law seems clearly manifest and if respondent's view is to prevail it is equally clear that it will operate to defeat that policy. The law con-
116 templates the exchange of one perfect title for another and, of course, it could not be expected that the general land department of the United States would approve of a lieu selection for land that is no longer available to the Government. It is true that, in the instant case, the United States might not in any event approve the selection, and it may be that the State has exhausted its lieu rights, but no such condition has been shown and we must necessarily presume a situation to the contrary. The statute means and can mean nothing less than that while this land is a part of the forest reserve it must be held as the basis for indemnity selections until at least it may be determined by proper authority that it can not be used for said purpose.

The case of Curtin vs. Benson, 32 Sup. Ct. Rep., 31, cited by respondent, is not inconsistent with this view. There, the proposition decided was that "The Secretary of the Interior can not make " the exercise by an owner and lessee of lands within the Yosemite " National Park of his right to pasture his cattle upon such lands, " and to use the toll roads leading thereto, conditional upon his " compliance with certain rules and regulations prescribed by the
" Secretary for the government of the park, as to marking
117 " and defining the boundaries, or obtaining the written per-
" mission of the superintendent."

The land, as observed, was held in private ownership and it was not subject to any such statutory provision as is involved herein. As stated by the Supreme Court, the decision was rested "on the " ground of the want of power of the secretary or the superintend- " ent to limit the uses to which lands in the park, held in private "ownership, may be put."

But at any rate, we think it apparent that the United States is a necessary party to the final determination of the controversy and should be joined in the litigation. As we have seen, the State has done all it could to divest itself of title to the land, at least to 600 acres of it, has sold its scrip and the lieu selection has actually been made and approved by the local land office, and the only thing remaining to vest complete title in the United States is the affirmance by the general land office of the action of the local department. Under these circumstances it is manifestly a matter of grave concern to the United States whether this land is still available as the basis for an indemnity selection. It has a direct interest in that question and so has the plaintiff in the consideration of whether the
general land office shall approve or has approved of the
118 selection. Indeed, it may be that before judgment was rendered for plaintiff the title to the land vested in the United States by virtue of the approval of said selection. In that event, plaintiff previously having notice of the proceedings before the land department pending at the time the suit for condemnation was instituted and the United States not being a party thereto, its

title would not be destroyed but there would be probably a cloud upon it by virtue of said decree of condemnation.

In this view we think it is a case for the application of that portion of Section 389 of the Code of Civil Procedure providing that "When a complete determination of the controversy can not be had without the presence of other parties, the Court must then order them to be brought in and to that end may order amended and supplemental pleadings, or a cross-complaint to be filed and summons thereon to be issued and served.

The judgment and order are reversed.

BURNETT, *J.*

We concur:
HART, *J.*
CHIPMAN, *P. J.*

118½ Due service and receipt of a copy of the within is hereby admitted this — day of January, A. D. 1913.

——— ———.

119 In the Supreme Court of the State of California, Sacramento.

No. 2081.

DESERET WATER, OIL AND IRRIGATION CO., a Corporation, Plaintiff,
vs.
STATE OF CALIFORNIA, Defendant.

Order Granting Petition for Hearing in Supreme Court After Judgment in District Court of Appeal.

BY THE COURT:

The petition to have the above entitled cause heard and determined by this court after judgment in the District Court of Appeal for the Third Appellate District is granted, and said cause transferred to this court for hearing and decision; also ordered that the record herein be transmitted to this court.

HENSHAW, *J.*
ANGELLOTTI, *J.*
MELVIN, *J.*
SHAW, *J.*
SLOSS, *J.*

Dated this 24th day of January, 1913.

Filed Jan. 24, 1913. B. Grant Taylor, Clerk, by Erb., Deputy.

120 [Endorsed:] No. 2081 Sacramento. In the Supreme Court of the State of California. Deseret Water, Oil and Irrigation Company, a Corporation, Plaintiff, vs. State of California, Defendant. Order Granting Petition for Hearing in Supreme Court after Judgment in District Court of Appeal. U. S. Webb, Attorney General, Attorney for Defendant. 1212 Humboldt Building, San Francisco, California.

121 Sac. No. 2081. In Bank. January 20, 1914.

DESERET WATER, OIL AND IRRIGATION COMPANY (a Corporation), Plaintiff and Respondent,

v.

THE STATE OF CALIFORNIA, Defendant and Appellant.

This appeal is from a judgment in favor of plaintiff in an action in eminent domain and from the order denying defendant's motion for a new trial.

[1.] Plaintiff is a corporation organized under the laws of the state of Nevada. It has complied with the laws of the state of California governing its right to do business herein. By compliance with such laws it has acquired the right to do business in California and to that extent is domesticated herein. Whatever controversy may have existed over the right of such a corporation to exercise the power of eminent domain is now laid to rest by the decision of this court in bank in San Joaquin, etc. v. Stevinson, 164 Cal. 221, where such right is expressly declared to exist.

The discussion in that case is so full as to relieve from the necessity here of doing more than to refer to it.

Plaintiff is a public service corporation. It sought to condemn the land in question for the purpose of preserving and maintaining water rights, water sheds and sources, equipping, operating and maintaining canals, laterals, aqueducts, flumes, tunnels, ditches, pipes and pipe lines with all their appurtenances; supplying, selling and distributing water and electric power to mines, farming neighborhoods, cities, towns, villages and other municipal divisions, and to corporations and individuals; draining, reclaiming and irrigating lands, and equipping, operating and maintaining ditches, reservoirs, dams, tunnels, levees, viaducts, bridges, excavations and sites for the collection, storage, sale and distribution of water; for the operation and maintenance of pumps and pumping plants, electrical lighting and power plants and electric power lines by means of poles, wires, conduits and subways. The purposes for which the corporation was organized are these just indicated, and they are most of them purposes for which the right of eminent domain may be exercised. (Code Civ. Proc., sec. 1238.)

The principal contention of the appellant is that this particular section of land is not subject to the exercise of this right. Section 1240 of the Code of Civil Procedure declares that the right of eminent domain may be exercised upon "all lands belonging to the state * * * not appropriated to some public use." Appellant contends (*a*) that these lands had been devoted to public use, and (*b*) that they had by the state been withdrawn so as not to be subject to a taking in eminent domain proceedings.

The land is a sixteenth section, title to which passed to the state by virtue of the federal school land grant. It is a surveyed section, title to which has completely vested in the state. (Heydenfeldt v. Mining Co., 93 U. S. 634; Cooper v. Roberts, 18 How. 173; Hibberd

v. Slack, 84 Fed. 571; Slade v. Butte Co., 112 Pac. 485.) After this complete vestiture of title in the state, a national forest reservation was created, which within its exterior boundaries included this section 16 in the county of Mono. The situation thus disclosed is, that complete title to the land having vested in the state of California before the creation of the forest reserve, that title was in no way affected or impaired by the act of the federal authorities in creating this reserve, any more than would their act affect the rights of any other private proprietor owning land within the delimited boundaries of the reservation. (Curtain v. Benson, 32 Sup. Ct. Rep. 31.)

Certain fundamental legal considerations lie at the threshold of the main inquiry presented by this appeal. They are quite obvious and indisputable and may be thus stated: The state of California has declared that any and all of her lands held by her in sovereign proprietorship, excepting such as may be devoted to a public use, may be taken from her by anyone qualified so to do under proceedings in eminent domain. (Code Civ. Proc., sec. 1240, subd. 2.) The state of California in this matter has consented to become a party litigant before her own courts, and when brought before the courts in such a proceeding her rights are no other than those of any other private proprietor (Code Civ. Proc., sec. 1240, subd. 8; Civ. Code, sec. 1001. See C. & N. Ry. v. State, 1 Cal. App. 144; Mitchell v. U. S., 9 Pet. 711; U. S. v. O'Grady, 22 Wall. 641; Mt. Copper Co. v. U. S., 142 Fed. 625; Johnston v. Stimmel, 89 N. Y. 1170.) The conclusion therefore is necessarily this, that if the land in question still belongs to the state of California, and has not by the state been appropriated to some public use, it is with the state's own permission and invitation subject to be taken in such proceeding.

[2.]The creation of a national forest reserve is, as to such lands as are under control of the federal government, a dedication and an appropriation of these lands to a public use. (Light v. U. S., 220 U. S. 523.) Upon this it is declared in argument that all lands within the boundaries of such a reservation are likewise appropriated to a public use. If such lands are held in private ownership either as here by the state or by other locators, pre-emptors or purchasers from the general government, or from the state, this necessarily cannot be so. The action of the United States cannot affect and is not designed to affect lands so held.

If in fact then this land has by the state been devoted to public use, it cannot be from the mere act of the federal authorities
122 in creating the reservation, but must be found in some affirmative action by the state itself which alone has title to and control over this section. It is contended that it is found in the legislation of this state touching sections 16 and 36 granted to the state under the School Land Act when such sections have been embraced within the boundaries of a federal reservation. The legislation of the state upon the subject is to be found in sections 3398 to 3409, inclusive, of the Political Code, as affected by a later act of the legislature approved May 1, 1911. (Stats. 1911, p. 1408.) By

section 3408*b* "all sixteenth and thirty-sixth sections, surveyed, and unsurveyed, which may now or may hereafter be included within the exterior boundaries of a national reservation, shall be * * * and are hereby withheld from sale by the state, and the same shall hereafter be used only as bases for indemnity selections as in this article provided." The act of 1911, later in date, modifies this language by a declaration that such lands "are hereby withdrawn from sale by the state of California and that 'Sec. 3. Nothing in this act contained shall be construed as preventing the use of said sixteenth and thirty-sixth sections as bases for indemnity selections provided by law'" Section 3408*c* provides as follows:

"Whenever there shall exist in the state of California as may be determined by the surveyor general the rights to select any lands from the United States, for any of the causes or reasons for which it may now or may hereafter under the laws of the United States be entitled to make indemnity selections, the surveyor general shall ascertain from time to time the number of acres of land to which the state is entitled as indemnity and shall keep on file a statement showing of what such bases consist. In determining the bases in lieu of which the state is entitled to indemnity, the surveyor general shall also include all sixteenth and thirty-sixth sections which were surveyed at the time of the withdrawal of such lands from public entry, or at any time thereafter; provided, however, that should the land department of the United States determine that such surveyed sections are improper or invalid bases, then the surveyor general shall not be required thereafter to consider or treat said surveyed sections as valid or any bases for indemnity selections."

The succeeding section provides for the sale of scrip based upon the state's right to indemnity selections and entitling the purchaser to make such indemnity location. It is further provided that "Whenever it is made to appear to the satisfaction of the surveyor general that the base or bases named in any certificate of indemnity or script is or are invalid, or will not be accepted by the land department of the United States, the owner and holder thereof may surrender the same to the surveyor general and be entitled to restitution therefor." This sufficiently sets forth all of the state law necessary for the present consideration.

The federal law to which these provisions of the state law are manifestly and admittedly addressed are sections 2275 and 2276 of the Revised Statutes of the United States as amended in 1891. In substance those sections declare that when any of these
123 school sections so conveyed to a state are lost to the state, either by superior claims of homestead or pre-emption settlers, or because they are mineral lands, or because they are included within any Indian, military or other reservation, or because they are otherwise disposed of by the United States "other lands of equal acreage are hereby appropriated and granted and may be selected by said state in lieu of such as may be thus" lost. By appellant it is contended that notwithstanding the title to such a school section has absolutely vested in it before the creation of a forest federal

reservation, it has elected to surrender such section to the United States, seeking indemnity and compensation therefor under the federal indemnity grant provided for in the above cited sections of the federal statutes. And further the state contends that this federal grant is broad enough to include such selections as indemnity selections and that the interior department of the United States so construes the law. Furthermore, that the state has taken the appropriate steps in the various federal land offices to accomplish this desired result, so that the present status of these lands is that the state has offered them to the United States in exchange for other equivalent public lands belonging to the general government. Therefore, the conclusion is that the state has, at least in equity, parted with its title, which title in equity is reinvested in the United States.

[3] If appellant's position in this matter be sound there is an end to the controversy and the trial court erred in awarding a judgment in condemnation. But while one party may offer to contract, the assent of the other party to the offer must in some way be evidenced before any rights, legal or equitable, can spring into existence. As it is unquestioned that the control of the public domain is vested in congress alone, and that only congress can dispose of the public lands of the United States, the first inquiry must be directed to ascertain what congress has done in the matter. It is conceded that all that it has done—the only provision that it has made for a case such as this—is disclosed by the language of the federal statutes above cited. But herein it is to be observed that all that congress had in contemplation in passing these statutes was to indemnify states and territories for losses of school sections, which losses might befall the state for the reasons therein given. Further, it is to be observed that the only grant which congress made was of lands to make good such losses—lieu lands by way of indemnity. And finally it is to be noted that the statutes of this state above referred to treat and speak of the acquisition by the state of other lands solely by way of indemnity. This language is strictly appropriate to those school sections lost to the state for the various reasons indicated, as by the prior right of settlers or purchasers, as by the fact that they were mineral lands, as by the fact that they were within declared military, Indian, forest or other national reservations, and as by the fact that before survey they were put within such reservations. But indemnification means nothing other than the making good of a loss. (Slade v. County of Butte, 14 Cal. App. 453; Johnston
124 v. Morris, 72 Fed. 890.) The federal grant was strictly an indemnity grant and nothing else. Such would appear manifest from a reading of the language of the federal statutes and such is the decision of the circuit court of the United States in the carefully considered and elaborately reasoned case of Hibberd v. Slack, 84 Fed. 571, and the conclusion necessarily follows that a section such as this may not be exchanged with the United States under the indemnity grant provided for by section 2275 of the Revised Statutes of 1891. But against this it is urged that notwithstanding the decision of the United States circuit court upon this very federal statute, we should ignore that decision and follow the rulings of the interior

department, which rulings have permitted such exchanges. In this behalf it is argued that the secretary of the interior is himself vested with judicial functions and that his construction, or his solicitor's construction of the statute, should be preferred and adopted. It is the duty of this court to adopt the construction of the statutes of the United States given by the courts of the United States. We have in at least the two cases above cited declarations by those courts as to the scope and meaning of the indemnity grant in question. [4] That grant does not contemplate an exchange of lands between the state and the United States, but the making good to the state of a loss which it may sustain in a failure to get land which the United States attempted to grant to it. It is a novel proposition to say that the ruling of an executive department should stand superior on the construction of a federal statute to the solemn adjudication of a court charged with the express duty of announcing the meaning of a statute in a litigated controversy over that meaning. It certainly requires no citation of authority to show that the construction so placed by a federal court upon a federal statute is superior to such a departmental ruling. And equally certain is it that though the interior department may elect to ignore the decisions of the courts of the United States, it is still not within the power of such a department to give, to sell or exchange the public domain without authority from congress. And if, as the federal courts have decided, congress has not given the department such authority, the department's efforts and acts in the exchange of such lands, when brought before a judicial tribunal, will be declared null and void. [5] The conclusion upon this branch of the consideration therefore necessarily must be that while the state of California has by appropriate legislation offered to exchange such lands for other lands of the United States, there is no law of the United States authorizing such an exchange, and no act of the congress of the United States taken in contemplation of any such exchange, present or future. Therefore the position of our state law (Act of 1911) that these sections may be used as "bases for indemnity selections provided by law" is without any present efficacy by reason of the fact that there is no law of the United States either authorizing indemnity selections in such cases, or authorizing an exchange of lands in any other way. To the further argu-
125 ment upon this matter, that the state has already sold scrip based upon such proposed indemnity selections, the answer is found in the state statute above quoted. The purchaser is entitled to a restitution of his money upon the failure of the United States to make provision for the exchange.

A further argument upon the general subject is that the state has withdrawn such sections from sale and that therefore the right of eminent domain may not be exercised regarding them. This, however, cannot be, in contemplation of the general law touching the right of eminent domain. Our statutes do not say that state lands reserved from sale, or state lands not offered for sale, shall not be subject to the right of eminent domain. They declare that all the lands of the state shall be subject to this right, saving such lands alone as are devoted to a public use. The state might today have no laws for the sale of its proprietary lands. But this would not affect the

power to exercise the right of eminent domain as accorded by the statutes of the state. The question of sale or non-sale imports a foreign element into the discussion. The sole defense in this respect which may be made by the state, conceding that it owns the land in controversy, is that the land has been appropriated to a public use. That this land was not so appropriated we have discussed at length. In addition to that, the concessions of the pleadings declare that no part of it is so devoted.

[6] The foregoing cover the principal contentions advanced by appellant against the judgment given herein. It urges certain minor contentions, as that the complaint is insufficient because it does not show plaintiff to be in charge of a public use. But plaintiff is organized as a public service corporation and must acquire the utilities to perform that service by purchase or by condemnation. The law does not contemplate that such a corporation must first be engaged in public service before the right of condemnation attaches. (Northern Light Co. v. Stacher, 13 Cal. App. 404; Tuolumne Water Co. v. Frederick, 13 Cal. App. 498.) Its articles of incorporation are broad enough to entitle it on behalf of recognized public uses to commence and maintain the action. Nor does the fact that certain of the purposes declared in the complaint may not be expressly enumerated in section 1238 of the Code of Civil Procedure operate against the judgment. Most of the purposes set forth in the complaint come strictly within the language of the section, and the evidence was ample to sustain the complaint in these respects. There was no demurrer to the complaint, and it is immaterial that certain of the asserted purposes do not fall within the list enumerated in the code. (C. P. R. Co. v. Feldman, 152 Cal. 306; Northern Light Co. v. Stacher, supra.) [7] The argument is advanced that the complaint shows that the articles of incorporation empowered the plaintiff to "acquire" lands and property rights for the purposes of public use. But it is argued that the right to acquire does not include the right to condemn. Yet section 1001 of the Civil Code uses this very word in declaring that "any person may acquire private property for any use specified in section 1238" of the Code of Civil Procedure by proceedings in eminent domain.

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The complaint is sufficient. It contains all of the allegations required by section 1244 of the Code of Civil Procedure. It says that the use sought of the lands is a public use and that the plaintiff is entrusted with and in charge of such a public use. The action seeks to condemn the whole section and not rights of way thereover. It was unnecessary therefore that the complaint should conform to the requirements of section 1244 of the Code of Civil Procedure, which is applicable to cases where a right of way only is sought. It was not error to award to the plaintiff the whole of the section. Uncontradicted evidence was introduced showing that because of the topography of the country and the climatic conditions and other reasons the whole section, as well as other adjoining properties, are necessary to the successful accomplishment of the objects and purposes of the plaintiff as a public service corporation. (City of Santa Ana v. Gildmacher, 133 Cal. 395; Spring Valley Co. v. Drinkhouse,

92 Cal. 532; Los Angeles v. Pomeroy, 124 Cal. 597; C. P. R. Co. v. Feldman, supra.)

It is further argued that owing to the conditions which have been shown to exist concerning the land in controversy, complete justice cannot be done without bringing into court the United States as a party defendant. But this of course, however desirable, is beyond the power of the state court to do. (Case v. Terrell, 78 U. S. 199; Kawananakoa v. Polybank, 205 U. S. 349; Kansas v. Colorado, 206 U. S. 46; Sawyer v. Osterhaus, 195 Fed. 655; The Davis, 10 Wall. 15; Bulkley v. U. S., 196 Fed. 429; Oregon v. U. S., 202 U. S. 60; Minnesota v. Hitchcock, 185 U. S. 373.) The United States can be sued only in such cases and in such courts as are permitted by its own laws. Therefore the provision of subdivision three, section 1240, of the Code of Civil Procedure, by which the state declares that the lands "owned or held by the United States in trust or otherwise" may be subjected to proceedings in eminent domain, stands upon our statute books without the slightest efficacy until the United States government itself shall have authorized the states to bring itself and its lands into their courts.

Running through many of the propositions which appellant has advanced is an argument touching the desirability of giving effect to this attempted retransfer of lands to the United States. Herein it is pointed out that it is most advantageous to the United States that it should hold title to all lands within its reservations, that there may be simplicity and uniformity in their control by the United States without friction or interference with the rights of private owners, and, second, that such reserve-locked lands are of less value to the state than would be equivalent lands not surrounded by United States lands under federal reserve. Again it is said that the state, if allowed to sell scrip upon the basis of such indemnity selections, would reap a larger profit than it would from the sale of such enclosed school sections. And again it is asserted that by force of the language of section 3406*a* of the Political Code it should be
127 held that the title of the state should be decreed to have vested in the United States at the date of the state's listing. This last proposition meets with the immediate answer that the state laws nowhere contemplate a gift to the United States of any of these lands. Every word of our law contemplates an exchange for equivalent lands and it is therefore untenable to hold that an unauthorized acceptance by the United States land department of such listing by the state, with no further act upon the part of the United States, for the reasons already given, can operate to divest or even to impair the title of the state.

But on the general argument we think that the true interests of the state are quite the opposite of those declared in the brief of the attorney-general. One familiar with the constitutional history of the United States need not be reminded of the jealously with which, before the adoption of the present constitution and during the sessions of the continental congress and the existence of the articles of confederation, the original states, and particularly Virginia, in their cessions of lands to the United States guarded their own rights and limited the powers of the United States over them, until in October,

1780, congress resolved that the lands which may be ceded to the United States by any particular state shall be disposed of for the common benefit of the United States and be settled and formed into distinct republican states, which shall become members of the federal union, and have the same rights to sovereignty, freedom and independence as the other states. The fundamental proposition assented to by the United States upon which these cessions were based was that the public lands within new states, existing or to be created, should be disposed of, sold, for the benefit of the United States, for the reason that the states believed it would be injurious to their sovereign rights that any large areas of land within their boundaries should be permanently beyond their taxing power and control and within the sovereign jurisdiction of another power. Further, it is to be remembered, that all new states were to be admitted to the Union upon terms of exact equality with all other states, and the act of admission of the state of California declared that "the state of California shall be one and is hereby declared to be one of the United States of America and admitted into the Union on an equal footing with the original states in all respects whatever. The people of said state shall never interfere with the primary disposal of the public lands within its limits." In the case of Pollard's Lessee v. Hagan, 3 How. 212, the Supreme Court of the United States with great learning discusses these contracts between the several states and the United States and the meaning and force of the constitutional provisions thereafter passed. It is there declared as to the government lands within such states that the United States never held any municipal sovereignty, jurisdiction or right of soil in and to their territory, or in and to the territory of any of the new states, excepting the right over them of executing the trust, which trust was to provide
128 for their disposition by cessions or sale. It is further held that every new state comes into the Union upon terms of equality with all other states, and such an equality cannot exist if in one state it exercises sovereign powers over the lands, while in another it has disposed of such lands, or in the execution of its trust must dispose of them. In Coyle v. Smith, 221 U. S. 559, these doctrines are reasserted and affirmed, and the power of the United States to pass any law which will create inequality between the states has repeatedly by the Supreme Court of the United States itself been declared to be void and of no effect. (New Orleans v. De Armas, 9 Pet. 224; Groves v. Slaughter, 15 Pet. 449; Illinois Central R. R. v. Illinois, 146 U. S. 387; United States v. McBratney, 104 U. S. 621; Hardin v. Shedd, 190 U. S. 508; United States v. Winans, 198 U. S. 371.)

We are of course not unmindful of the decisions of the Supreme Court of the United States, such as Camfield v. United States, 167 U. S. 524, Kansas v. Colorado, 206 U. S. 89, and Light v. U. S., 220 U. S. 523, which declare that within the governmental trust to "dispose" of its public lands vast areas of them within existing states may be taken from the dominion and control of the state and placed in perpetual reserve, and that the execution of the trust under which congress holds these lands rests with congress alone. Whether incon-

sistency and hostility exist between this latter line of decisions and that headed by Pollard's Lessee v. Hagan, the Supreme Court of the United States itself in due time will declare. But here we desire to point out that while the state of California was admitted as a sovereign state of the Union upon equal terms with all the other states, and while it has been judicially declared that an essential part of that equality is the disposition of the public lands within the state, to the end that the revenues by taxation therefrom and the control over them may be vested in the state, we have in California a withdrawal by the United States from sale and a placing in reserves of one-third of the area of the whole state—an area greater than the combined territory of New Hampshire, Vermont, Massachusetts, Connecticut, Rhode Island, New Jersey and Maryland. Not this alone, but we have in these withdrawals a refusal upon the part of the United States to yield to the state of California control over its natural sources of wealth. Its forests, its mines, its oil-bearing lands, its power sites and possibilities, have been withheld by the United States, which proposes to exercise over them, and is exercising over them, the "municipal sovereignty" which the Supreme Court of the United States in Pollard's Lessee v. Hagan declared not to exist. If at the time of the proposed cession of its lands by Virginia, congress had declared its intent to be that which it has actually executed in the state of California, little doubt can be entertained as to the answer which Virginia would have made. It is indeed a departure from the accepted construction of these constitutional provisions to have
it said that the United States may, as here, withdraw from
129 state use one-third of the area of a sovereign state, forever
deny to the state the sovereign power of taxation and control over these lands, and develop and exploit them under its own rules and regulations for the enrichment of its own treasury. And so, coming to the specific section of land here under consideration, if it has possibilities of water storage and power development, certainly it is to the interest of the state that these potentialities should be developed in the interest of its citizens and the revenue derived therefrom by rates, tolls and taxation go into its own treasury, rather than to witness them lying undeveloped and unimproved, or, if improved at all, improved for the enrichment of the national treasury. This is meant to convey no criticism of true conservation of natural resources. But it is a simple declaration of a manifest fact that in a state such as California, a large part of whose territory and whose natural resources are taken away from state control, the denial of the right of taxation on such lands, the erection of an imperium in imperio, are developments of governmental ideas not dreamed of at the time of the adoption of the constitution, nor at the time of the decision of Pollard's Lessee v. Hagan. And in the state of California the cause of conservation would not suffer if intrusted to the state itself.

Finally it may be said that if the state shall believe its rights or interests to be affected by the adoption of the decisions of the federal courts in the construction of the federal statute, which is indisputably a matter of much moment, the path is clear to the Supreme

Court of the United States, where the true and final construction of the statute will be given and all doubts put to rest.

The judgment appealed from is therefore affirmed.

HENSHAW, *J.*

We concur:
SHAW, *J.*
LORIGAN, J.
MELVIN, *J.*

130 In the Supreme Court of the State of California.

Sac. No. 2081.

DESERET WATER, OIL AND IRRIGATION COMPANY, a Corporation, Plaintiff and Respondent,
vs.
THE STATE OF CALIFORNIA, Defendant and Appellant.

Petition for Rehearing in the Supreme Court.

U. S. Webb, Attorney General, and John T. Nourse, Deputy Attorney General, Attorneys for Appellants.

Filed this — day of February, A. D. 1914. B. Grant Taylor, Clerk, by —— ——, Deputy Clerk.

131 In the Supreme Court of the State of California.

No. 2081, Sac.

DESERET WATER, OIL AND IRRIGATION COMPANY, a Corporation, Plaintiff and Respondent,
vs.
THE STATE OF CALIFORNIA, Defendant and Appellant.

Petition for Rehearing in the Supreme Court.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the State of California:

The appellant asks that this cause be reheard by this Honorable Court and in support of such application submits the following:

Because of the very wide range taken by the opinion in this
132 case, filed January 20, 1914, it seems well at this time to recur to the questions presented by the record.

Appellant contended at the trial and after appeal that plaintiff could not maintain the action; that the complaint did not state a cause of action, and that the land involved in this case could not be acquired through eminent domain.

At the time the case was submitted in the district court of appeal,

no direct ruling upon the first question had been had, but that question was, after such submission, put at rest by the decision in San Joaquin etc. Co. vs. Stevensen, 164 Cal. 221.

There the doctrine was established under which foreign corporations may maintain proceedings in eminent domain, and since such decision, appellant has not insisted upon this point.

The opinion discusses conservation and the policy of national reserves along lines quite in accord with the position taken by Mr. George Edwards of Berkeley in a thesis entitled "Brief Developing Title to Public Lands," not, however, filed as a brief in this case; but these questions were not within the issues, not material to the determination of the cause, and not discussed in the record by either of the parties whether the national policy of conservation
133 be wise or unwise, or beneficial or detrimental to the State, is a question which this record does not present, and one which appellant is not called upon to defend or to denounce, and what is said upon that subject in the opinion of the court, it is respectfully submitted, should be eliminated therefrom.

The sufficiency of the complaint and the effect of the act of 1909 withdrawing lands situated in exterior limits of forest reserves from sale are questions within the issues, presented by the record, and we desire to again urge these questions upon the attention of the court.

We will call the court's attention to the further fact that the judgment fixes a value of one dollar per acre upon the lands condemned, while the evidence offered by appellant showed such lands were worth to the State more than three times such amount.

These questions will be discussed in order.

I.

The Complaint Is Not Sufficient Because It Does Not Allege that Plaintiff Was in Charge of Any Public Use.

It has always been contended by appellant that plaintiffs' complaint failed to comply with the positive requirements of
134 section 1244 of the Code of Civil Procedure which reads, so far as material, as follows:

"The complaint must contain:

1. The name of the corporation, association, commission, or person in charge of the public use for which the property is sought, who must be styled plaintiff."

The complaint does not contain any such allegation. Paragraph one is a mere statement of its incorporation under the laws of the State of Nevada, and its authority to do business in this State by reason of the laws of this State. Paragraph two merely sets forth the purposes for which the plaintiff is incorporated. Paragraph three states the name of the owner of the property sought to be condemned. Paragraph four contains an allegation of the necessity for the taking. Paragraph five alleges that the property has not

been appropriated to any public use, and paragraph six is a mere statement as to the fictitious defendants.

In Beverige vs. Lewis, 137 Cal., 619-621, this court said:

"It is admitted on all sides and necessarily that the proceeding can be maintained only by one who is in charge of a public use and who intends to perform the public service."

135 Though the complaint is silent upon this matter the decision of this court rendered on January 20, 1914, states:

"The complaint is sufficient. It contains all of the allegations required by section 1244 of the Code of Civil Procedure. It says that the use sought of the lands is a public use and that the plaintiff is entrusted with and in charge of such a public use."

Though this allegation does not appear in the complaint and was not put in issue, the court found that the plaintiff was, at the time of the bringing of the action and prior thereto, in charge of a public use. (Transcript, page 11, fol. 32.) Not a word of evidence was introduced to support such a finding, but on the contrary the only evidence bearing upon the matter proved the direct opposite of the court's finding. (See Trans., p. 42, fol. 125, testimony of Mr. Ricketts, president of plaintiff corporation.)

"No work has thus far been done in the construction of power lines for water reservoirs or conduits. Our company has the promise of money with which to do this work. We have not the money yet, there will be no lack of funds, etc. * * * The money is promised by the stockholders * * * We have not the funds absolutely in the treasury as yet." (Fol. 132.)

136 "I am not advised at this moment that we have any use of the waters of Lake Ellery, we own no water rights there at present." (Fol. 130.)

"All the water rights within section 16, according to my knowledge, information and belief, are already appropriated, and consequently we will have to acquire our water rights from the present proprietors thereof. We get no water right, nor seek to gain any by this proceeding. There are no water rights that can be acquired by us other than by consent of the present proprietors, who are private individuals. At present we have no water with which to supply this reservoir."

The evidence submitted by plaintiff goes to show that it is plaintiff's intention to, at the same time, engage in the businesses of furnishing water, light and power to the persons around Mono Lake, and also (Trans., p. 33, fol. 126, testimony of Mr. Ricketts),

"One of the purposes of the company is the extraction of minerals from the waters of Mono Lake precipitating the minerals."

There is no evidence to show that plaintiff was engaged in any public use at the time of the commencement of the action, or that it owned any water right, possessed any canal rights, or rights of way, had constructed any pipe lines, power houses, reservoirs or

137 dams, or had ever served any person with water, light or power, or that it was in position to do so or could do so if it acquired this land, or that it had purchased or acquired or owned any property of any description whatever or that it had evidenced

any intention of engaging in any of the public uses set forth, or for which the property is sought to be condemned, beyond a mere filing of its articles of incorporation. There is no evidence to show that plaintiff had applied for rights of way for the construction of reservoirs, canals, dams, pipe lines or power houses, or that it had been granted any of such rights by the Bureau of Forestry of the United States Government, as is required by section 1422 of the Civil Code, before any of such rights can be had or any of the purposes accomplished within a forest reserve. Nor is there any evidence to show that plaintiff had applied to the State Water Commission, under the provisions of the act of April 8, 1911 (Statutes 1911, p. 813), for the right to appropriate and use any of the waters of Lake Ellery or the adjacent streams, for the purposes mentioned in the complaint nor that it had received a license from the State Water Commission to appropriate and use any of said waters.

There is a complete absence of allegation or proof to the
138 effect that plaintiff was engaged in any public use, beyond the mere filing of its articles of incorporation which, as appears from the complaint, authorized it to engage in almost any kind of business. If this complaint is sufficient to authorize a corporation to take the private property of the people of this state, there is no limit upon the use for which the eminent domain provisions of the code may be used. If the mere filing of articles of incorporation, authorizing a corporation to engage in businesses which are designated as public, is sufficient to authorize that corporation, without any other act, to take the private property of individuals in this state, then the mere statement of an individual that he desires private property of another individual for a purpose for which he may have in his mind only, is sufficient to enable that individual to take the other's property. Such a situation was never contemplated by the Legislature of this State in enacting the eminent domain provisions of the code, and is not supported by either the Northern Light Company or Tuolumne Water Company cases, which are quoted in the opinion as authority for that doctrine. In the Northern Light case, as well as in the Tuolumne Water Company case, the complaint showed that the plaintiff was actually engaged in some public use, that it had secured
139 franchises to serve the public with public service, or that other things had been done by the plaintiffs evidencing their good faith in engaging in public uses.

As the decision of the court in this case particularly recites the fact that the complaint contained an allegation that the plaintiff was in charge of a public use, we assume that our objection that the complaint was not sufficient upon this ground was overlooked in the opinion by reason of this error.

II.

The Property Sought to be Condemned was Devoted to Another Public Use.

In addition to what has been said in the briefs on file herein upon this point, it is sufficient to say that the court in its opinion has over-

looked the point insisted upon by appellant. It is not contended that the mere withdrawal of the lands and the creation of the forest reserve by the federal authorities, ipso facto, appropriates this property to a public use. It is the contention of the State that because such reserve has been created and authority to create such a reserve has been sustained by the United States Supreme Court, in Light vs.
140 United States, 220 U. S. 523-537, that, recognizing the supreme jurisdiction of the United States Supreme Court in the interpretation of the constitution and powers of the United States, the State has said that all sixteenth and thirty-sixth sections within the extreme boundary of the Forest Reserves shall be withheld from sale and withdrawn from all other purposes of any kind whatsoever, except the use as bases for indemnity selections. It is immaterial to the State at the present time whether Congress has authorized the acceptance of such transfers, or whether a congressional act is necessary to authorize the federal authorities to make such acceptance. The State has said that such lands shall be used for that purpose only, has offered them to the Federal Government for such purpose, and that offer is good until accepted or withdrawn by legislative authority.

The court in its opinion has entirely overlooked the State's contention, that the school section being the property of the State in clear title and subject to the State's disposition at any time, the State has said that they shall be used for a particular purpose, which we contend is a public purpose, to wit, bases for indemnity selections. As we have pointed out in our brief, filed upon the hearing in this
141 court, the school sections which remain within these Forest Reserves are of little value and cannot be sold to any advantage by the State. That practically all of such lands which are of value have been long ago taken up and disposed of. That the plan devised by the legislature of 1909, in what was called the Thompson Act, to use such sections as bases for indemnity selections, is the only plan by which the State may get any benefit or derive any profit from these school sections. The plan so devised is one of great importance and benefit to the State, because, as has been heretofore shown, such lands which have been practically unsalable in place have brought the State from three and one half to ten dollars per acre, through the sale of scrip in the manner provided by the act of 1909.

Though the State may not be at the present time in position to complete the transfer to the Federal Government, it has undoubtedly expressly declared that this school section shall be used for the purpose of making such transfer, and such use has been shown to be of great benefit to the people of the State and is unquestionably a public use, within the meaning of section 1240 of the Code of Civil Procedure.

142 III.

The Property Has Been Withdrawn from Sale and Consequently from Operation of Eminent Domain Proceedings.

The court has apparently overlooked and failed to consider the important language contained in section 3408*b* of the Political Code, to

the effect that all of the school sections are withdrawn from sale and that they

"shall hereafter be used only as bases for indemnity selections as in this article provided."

There is only one interpretation which can be given to the foregoing section and that is that the legislature in the enactment of that provision intended that such sections should be used for the purposes of indemnity selections only, and that such declaration was a withdrawal of such lands from the operation of the eminent domain proceedings.

That this section refers to surveyed as well as unsurveyed school lands is shown by the reading of the entire section, as well as by the provisions of section 3406*a* of the Political Code, enacted concurrently therewith, and which provides that all sixteenth and thirty-sixth sections, whether surveyed or unsurveyed, which lie within the
143 exterior boundaries of a permanent reservation shall constitute bases for indemnity selections, and

"That the title of the state to such surveyed school sections shall pass to and vest in the United States,"

upon the listing thereof in the Federal Land Department.

The State having withdrawn these lands from voluntary sale, it is unreasonable to say that it still intended that they should be subject to forced sale through eminent domain proceedings, especially where, as is shown to exist in this particular case, scrip upon such lands has been actually sold to bona fide purchasers the selections approved by the Surveyor General and the certificates actually delivered to the Federal Department. Though the State may not at the present time be in a position to make a complete valid transfer of the lands to the Federal Government, it undoubtedly has made the offer and has put itself in a position to make such offer effective by withdrawing the lands from sale for any other use by persons hostile to the interests of the State by so withholding the lands until the offer may be accepted and the transfer completed.

The departments of Interior and Agriculture, acting within the authority conferred upon them by Congress, may sell or dispose
144 of the public lands within this State, and assuming the correctness of the Hibbard vs. Slack decision for the time being, it has never been contended that in the absence of direct congressional authorization such departments may not exchange public lands for surveyed school lands. What was held in Hibbard vs. Slack was that sections 2275-76 of the Revised Statutes do not expressly authorize these departments to exchange public lands for surveyed lands. The Federal courts have never, however, held that this authority did not exist without express legislation. It has been assumed by the departments that the power did exist and the want of such power cannot be raised in this proceeding.

It is conceded that the question whether the act of 1909, which provided that these lands should be withdrawn from sale and should be used only as bases for indemnity selections also withdrew them from

condemnation is one of intention, but under all the rules of this court such question must be resolved in favor of the State when there is a doubt. In the concurring opinion of Mr. Justice Henshaw, in Miller vs. Pillsbury, 164 Cal. 199-205, this rule is stated in the following language:

"The sovereign is not brought within the scope of its own laws unless the intent that this should be done is made plainly to
145 appear. This general rule of construction favoring the sovereign in case of doubt is applied to grants by the state, to statutes of limitation, to rights of action, and indeed, to all laws and contracts concerning which it may be thought that the state is included or is a party."

And again,

"Under fundamental and familiar principles of construction of statutes such as this the existence of the doubt is the solution of the inquiry."

The foregoing rule could be well applied in this case. It is evident that the purpose of the Thompson Act can not be effected if these school lands are subject to disposal during the process of transfer. The Legislature recognized this fact and expressly provided that it should be withdrawn from sale. This is clearly a modification of the former acts authorizing the sale of such property. It also provided that such lands should be used only as bases of indemnity selections. It did not expressly say that they should not be condemned. But the meaning is clear, the necessity of denying the right of condemnation is clear, and if there be any doubt as to the intention of the Legislature to withdraw such lands from eminent domain proceedings, such doubt must under the familiar rules of construction be resolved in favor of the sovereign in
146 order that the act of 1909 may be made a workable act, and effect the purpose for which it was enacted.

All that has been said in the opinion relating to the want of power of the Federal authorities to accept the grant, has no application to the case before us. It has never been contended and can not seriously be contended that the legislature of this State is without power to withdraw these school lands from sale and condemnation, and to hold such lands intact for the purpose of transferring them to the Federal Government in exchange for other lands from which a revenue may be derived by the state, and the mere fact that the Federal Government had not, by congressional action, expressly authorized the acceptance of a transfer at the time of the legislative act, cannot affect the validity of that act or affect the withdrawal of the lands pending such time as the said act may become effectual.

IV.

The Judgment Giving All of the Section in Fee Is Contrary to the Findings and Against the Law.

The judgment clearly went beyond the statute in granting to the plaintiff all of the section in fee. The is nothing to justify
147 this judgment in any respect. The allegations of the complaint do not demand it and the evidence does not support

it. Section 1239 of the Code of Civil Procedure defines the estates and rights in lands subject to be taken for public use as follows:

"1. A fee simple, when taken for public buildings or grounds, or for permanent buildings, for reservoirs and dams, and permanent flooding occasioned thereby, * * *

2. An easement, when taken for any other use."

The evidence here shows that so far as the corporation has formed any plan for development of the section, it is the intention to use but a small portion thereof for reservoir purposes and that all of the remainder will be either used for rights of way, for power and pipe lines, or will not be used at all. The evidence shows that the plaintiff has not determined upon the use to which the land is to be devoted. The testimony of Mr. Ricketts (Trans., p. 32, fol. 124) discloses the following:

"I can't state at this time to my knowledge how much of this 640 acres of land will be required for power line purchase. I can't state to my own knowledge how much of this 640 acres is to be included or covered by our reservoir * * * (125) I
148 can't tell how many acres we are going to put in reservoir. * * *"

In the cross-examination of Mr. Read, the engineer of the company (Trans., p. 48, fol. 143), we find the following:

"The contemplated reservoir is at about the lowest point. I am judging a great deal from this map, without making a detailed survey, which shows the confluence of the two streams there, the natural point of storage, and Ellery Lake at the higher point. I couldn't answer how many acres would be within the contemplated reservoir; I have made no detailed estimate or anything of that kind."

Again we find the testimony of Mr. Ricketts (Trans., p. 44, fol. 130):

"We intend to locate some of our works there and we are going to erect a big dam near Lake Ellery within section 16 which would flood about half the section."

These were the only witnesses used by plaintiff upon this point and it is impossible to reconcile their testimony. By reference to the map (Plaintiff's Exhibit No. 5, in Transcript) we find that Lake Ellery is in the southwest corner of section sixteen, and that the junction of Warren Creek and Levining Creek is in the extreme northeast corner thereof. That the difference in elevation
149 between the northeast corner and Lake Ellery is 1,500 feet. The testimony of Mr. Ricketts shows that all of this country around Levining Creek is very precipitous. From the contour shown by the map and from the testimony of these witnesses the fall is from Lake Ellery to the northeast corner of the section. Such being the case it would be physically impossible to flood the entire section, or any substantial part of the section, by a dam constructed at the junction of Warren Creek and Levining Creek, unless such dam were more than 1,500 feet in height. If, as testified to by the president of the company, it is its purpose to construct a dam at Lake Ellery, then less than half of the section would be flooded

by the reservoir, and hence the judgment giving all of the section to plaintiff in fee is beyond the issues and unsupported by either the pleadings or evidence. Furthermore, in the findings of fact (Trans., p. 14, fol. 39) it is found that all of the section is necessary to ensure uninterrupted service of water, light, power and heat, and preserve the adaptability of the oil pipe lines therein for the purpose for which they are constructed, and for the public uses therein particularly mentioned, including all the uses for which the plaintiff corporation was incorporated. Thus the entire section is given in fee to plaintiff, though upon its own testimony it is
150 shown that some of it is necessary for the maintenance of power lines, some for pipe lines, some for water ditches and canals, and some for oil pipe lines, though plaintiff judiciously withheld all information as to where it would get any oil in that county.

In this respect the complaint does not state a cause of action, in that it does not allege what estate is necessary for the uses of the plaintiff, and the findings and conclusions of the court upon that point are entirely beyond the issues and unsupported by any evidence.

V.

The Value of the Land.

The testimony on behalf of the State (Trans., p. 59, fol. 174 to 177) shows how lands herein sought to be condemned were acaually sold to private persons long prior to the commencement of the action for prices ranging from $2.80 to $3.45 an acre. The only testimony on behalf of the plaintiff as to the value of the land is that of Mr. Read (Trans., p. 48, fol. 141):

"Q. What was the value of the land on that day?

A. It did not appear to me to have any intrinsic value. Very little if any intrinsic value.

151 Q. Well, what do you mean by very little value?

A. Well I should not think more than possibly a dollar an acre."

The finding that this land was worth but a dollar an acre is not supported by the evidence.

It has been held in this State that peculiar fitness for a special purpose is an element in estimating value of land sought to be condemned, and the real issue forms a factor in solving the problem of a market value.

San Diego L. & T. Co. vs. Neale, 78 Cal. 63;
Spring Valley Water Works Co. vs. Drinkhouse, 92 Cal. 532;
Santa Ana vs. Harlin, 99 Cal. 543;
Los Angeles vs. Pomeroy, 124 Cal. 597.

"The inquiry in such cases must be what is the property worth viewed not simply with reference to the uses to which it is applied, but with reference to the uses to which it is plainly adapted."

Mississippi P. R. B. Co vs. Patterson, 98 U. S. 403.

Against the positive proof on the part of defendant that this land was peculiarly adapted to the use by the State for sale of scrip and that as so used it was worth from $2.80 to $3.45 an
152 acre we have only the testimony of one witness, whose qualifications were not shown, that in his opinion the intrinsic value was $1.00 an acre.

VI.

Proper Parties Defendant Not Joined.

Section 1248 of the Code of Civil Procedure provides that the court in eminent domain proceedings must ascertain and assess "the value of the property sought to be condemned * * * and each and every separate estate or interest therein."

The complaint alleges that the State of California and three fictitious defendants were the owners of the entire section sought to be condemned. The evidence submitted at the trial shows that these other defendants were private individuals who had purchased scrip upon the land and who therefore had an equitable interest therein. It also showed that the State, acting through the authority of the Thompson Act, had filed the indemnity certificates with the Federal authorities and consented to the transfer of the entire section to the United States.

Thus, all the parties who held this scrip, as well as the Federal Government, were interested parties whose estate or interest
153 in the property should have been considered by the court and assessed before judgment in condemnation could be given.

Though the Federal Government may not be sued without its consent and may not be made a party to a suit in condemnation this does not justify a judgment in such an action taking away the estate or interest of the Federal Government in the land where it is not a party to the action.

The suggestion in the opinion that the State may recompense the holders of such indemnity certificates by returning to them the payments made to them does not meet the requirements of the code. Furthermore, the State is left in a position by reason of this decision, never contemplated by the law.

As has been shown in this particular case, these indemnity certificates have been sold at prices ranging from $2.80 to $3.45 an acre, yet the court has awarded the entire section to the plaintiff at $1.00 an acre. Thus the State is required to return to the individuals sums ranging from $2.80 to $3.45 an acre for their indemnity certificates, while the sums received from the plaintiff for a fee simple title to the land is but $1.00 an acre.

Furthermore, the court has not taken into consideration the fact which is of common knowledge that these certificates have
154 been sold by the State, and that thousands of acres of land are now owned and occupied by settlers depending upon a title which the court has herein declared to be worthless.

Upon the foregoing it is respectfully submitted that this matter should be again heard by the court.

U. S. WEBB,
Attorney General of California,
JOHN T. NOURSE,
Deputy Attorney General,
Attorneys for Appellant.

154*a* Sac., No. 2081. In Bank. February 19, 1914.

DESERET WATER, OIL, AND IRRIGATION COMPANY, Plaintiff and Respondent,
v.
STATE OF CALIFORNIA, Defendant and Appellant.

154*b* By the Court:

[1] The opinion in the above entitled case discloses that the United States has no interest, legal or equitable, in the land in controversy to call for its appearance in this controversy, and, further, if it had any such right, those rights would not be impaired by its non-appearance. For this reason the following paragraph in the opinion is unnecessary and is therefore eliminated:

"It is further argued that, owing to the conditions which have been shown to exist concerning the land in controversy, complete justice cannot be done without bringing into court the United States as a party defendant. But this of course, however desirable, is beyond the power of the state court to do. (Case v. Terrell, 78 U. S. 199; Kawanankoa v. Polybank, 205 U. S. 349; Kansas v. Colorado, 206 U. S. 46; Sawyer v. Osterhaus, 195 Fed. 655; The Davis, 10 Wall. 15; Bulkley v. U. S., 196 Fed. 429; Oregon v. U. S., 202 U. S. 60; Minnesota v. Hitchcock, 185 U. S. 373.) The United States can be sued only in such cases and in such courts as are permitted by its own laws. Therefore the provision of subdivision three, sec. 1240 of the Code of Civil Procedure, by which the state declares that the lands 'owned or held by the United States in trust or otherwise' may be subjected to proceedings in eminent domain, stands upon our statute books without the slightest efficacy until the United States government itself shall have authorized the states to bring itself and its lands into their courts."

The petition for a rehearing is denied.

155 In the Supreme Court of the State of California.

Sacramento, No. 2081.

DESERET WATER, OIL AND IRRIGATION COMPANY, a Corporation, Plaintiff and Respondent,

vs.

THE STATE OF CALIFORNIA, Defendant and Appellant.

Petition for Writ of Error to the Supreme Court of the United States.

Now comes the State of California, appellant in the above entitled action, and says:

That on the 10th day of January, 1912, judgment was rendered in the Superior Court of the State of California, in and for the County of Mono, and in favor of the plaintiff Deseret Water, Oil and Irrigation Company, a corporation, and against the defendant the State of California, and said action was thereupon dismissed as to all other defendants; that said judgment was duly entered and filed with the Clerk of said Court on the 15th day of January, 1912, in Book "C" of judgments at page 127; that thereafter and on the 2nd day of March, 1912, said defendant duly appealed to the District Court of Appeal of the State of California, in the Third Appellate District; that thereafter and on the 26th day of November, 1912, the said District Court of Appeal duly rendered its judgment and decision reversing said judgment, and said judgment and decision became final (Subject to rehearing in the said Supreme
156 Court) on the 26th day of December, 1912; that thereafter and on the 4th day of January, 1913, the plaintiff Deseret Water, Oil and Irrigation Company, a corporation, filed with the Supreme Court of the State of California its application for hearing and determination of said cause by said Supreme Court, after the decision of said District Court of Appeal; that thereafter and on the 24th day of January, 1913, said application was granted by the Supreme Court of the State of California; that thereafter and on the 20th day of January, 1914, the said Supreme Court of the State of California entered its judgment and decision affirming the judgment of the said Superior Court of the State of California, in and for the County of Mono; that thereafter and on the 9th day of February, 1914, the said defendant the State of California petitioned the said Supreme Court of the State of California for a rehearing in said cause; and that thereafter and on the 19th day of February, 1914, said Supreme Court of the State of California denied said petition for re-hearing and said judgment and decision of the said Supreme Court of the State of California thereupon became final.

That the said defendant the State of California was and is aggrieved, in that in said judgment and decision of the Supreme Court of the State of California, and in the proceedings had prior

thereto in this cause certain errors were committed to the prejudice of the said defendant the State of California, that is to say that in said judgment and decision of the Supreme Court of the State of California affirming said judgment of the Superior Court of said State, in and for the County of Mono, the plaintiff in said cause was permitted to take all of Section Sixteen (16),
157 Township One (1) North Range Twenty-five (25) East, M. D. M. containing six hundred and forty (640) acres of land, by and through proceedings in eminent domain, on the grounds that said lands were necessary for public uses of said plaintiff and were subject to such taking under the provisions of the laws of the said State of California relating to proceedings in eminent domain. That in said proceedings the said defendant the State of California contended, and still contends, that the said plaintiff was not authorized under the provisions of the laws of said State to maintain said action; that the lands sought to be condemned were not subject to condemnation in contemplation of the laws of said State in regard thereto; that said lands were appropriated to the public use of the State of California; that said lands were appropriated to the public use of the United States of America in connection with the creation and maintenance of a National Forest Reserve, known and designated as "The Mono Forest Reserve." That said lands had been withdrawn from the operation of the eminent domain provisions of the laws of the State of California by acts of the legislature of said State; that by reason of the offer of the said State of California to transfer said lands to the United States of America in lieu of other lands offered to said State of California as an indemnity selection said lands were no longer subject to be taken under the eminent domain provisions of the laws of said State; that by reason thereof the United States of America was an interested party and had, and still has, an equitable interest in said lands; that the Government of the United States was and is authorized to establish and maintain forest re-
158 serves such as the Mono Forest Reserve, and to with-draw from entry all public lands situated therein, and that by reason of such authority the said Government of the United States was and is authorized to establish and maintain a Mono Forest Reserve, and to transfer to the Government of the State of California lands outside of the boundaries of said Forest Reserve, in lieu of lands theretofore owned by said State of California situated within the boundaries of said Reserve.

That the judgment and decision of the said Supreme Court of the State of California was against each and all of the said claims of the said State of California, all of which more fully appears in detail from the Assignment of Errors filed herein and from the record of said cause.

Wherefore the said defendant the State of California prays that a writ of error may issue to the Supreme Court of the State of California for the correct-on of the errors complained of, and that a duly

authenticated transcript of the record, proceedings and papers herein may be transmitted to the United States Supreme Court.

Dated: August 30, 1915.

U. S. WEBB,
Attorney General of the State of California;
JOHN T. NOURSE,
Deputy Attorney General,
Attorneys for Defendant.

Endorsed: Filed Aug. 30, 1915. B. Grant Taylor, Clerk. By Erb Deputy.

159 [Endorsed:] Copy. No. 2081. Sacramento. In the Supreme Court of the State of California. Deseret Water, Oil and Irrigation Company, a corporation, Plaintiff & Respondent, vs. The State of California, Defendant & Appellant. Petition for writ of error to the Supreme Court of the United States. U. S. Webb, Attorney General, Attorney for Defendant, 1212 Humboldt Building, San Francisco, California.

160 In the Supreme Court of the State of California.

Sacramento, No. 2081.

DESERET WATER, OIL AND IRRIGATION COMPANY, a Corporation, Plaintiff and Respondent,

vs.

THE STATE OF CALIFORNIA, Defendant and Appellant.

Assignment of Errors on Writ of Error to State Court.

Comes now the defendant in error, to-wit; The State of California, and avers and shows that in the record and proceedings in the matter and cause above entitled, the Supreme Court of the State of California erred to the grievour injury and wrong of the said defendant in error, and to the prejudice and against the rights of the said defendant in error in the following particulars, to-wit:

1. The Supreme Court of the State of California erred in holding and deciding that the plaintiff in error, the Deseret Water, Oil and Irrigation Company, a corporation, was authorized under the laws of the State of California to maintain said action for the condemnation of the lands involved therein.

2. The Supreme Court of the State of California erred in holding and deciding that the lands involved in said controversy were not appropriated to the public use of the State of California.

161 3. The Supreme Court of the State of California erred in holding and deciding that the lands involved in said controversy were subject to be taken in eminent domain proceedings.

4. The Supreme Court of the State of California erred in holding and deciding that the lands involved in said controversy were not devoted to the public uses of the United States of America.

5. The Supreme Court of the State of California erred in holding and deciding that the lands involved in said controversy could not be exchanged by the State of California and the United States of America for other lands outside of the boundaries of said Mono Forest Reserve, in the absence of further legislation on the part of the Congress of the United States.

6. The Supreme Court of the State of California erred in holding and deciding that the offer of the State of California to transfer these lands to the United States of America in lieu of other lands situated outside of said Mono Forest Reserve did not remove said lands from the operation of the eminent domain provisions of the laws of the State of California.

7. The Supreme Court of the State of California erred in holding and deciding that the action of the State of California in withdrawing the lands in controversy in said cause from sale, and offering them to the United States of America in lieu of other lands situated outside of said Mono Forest Reserve, did not pass to the United States of America an equitable interest in said lands by reason of which the United States of America became an interested and necessary party in said cause.

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8. The Supreme Court of the State of California erred in holding and deciding that the United States of America, and the departmental officers acting therefor, were without authority to establish and maintain said Mono Forest Reserve and to devote the lands situated therein to the public use of the United States of America.

9. The Supreme Court of the State of California erred in holding and deciding that the complaint in said action stated a cause of action against the said defendant the State of California.

10. The Supreme Court of the State of California erred in holding and deciding that the plaintiff in said cause was entitled to take all of Section Sixteen (16), Township One (1) North, Range Twenty-five (25) East, M. D. M., containing six hundred and forty (640) acres, in fee simple title.

Wherefore for these and other manifest errors appearing in the record, said defendant in error, the State of California, prays that the judgment and decision and order of the said Supreme Court of California be reversed and set aside and held for naught, and that judgment be rendered in favor of said defendant in error the State of California, and forbidding the said plaintiff in error, the Deseret Water, Oil and Irrigation Company, a Corporation, from taking and holding any of said Section Sixteen (16), Township One (1) North, Range Twenty-five (25) East, M. D. M., containing six hundred and forty (640) acres.

Dated: August 30, 1915.

U. S. WEBB,
Attorney General of the State of California;
JOHN T. NOURSE,
Deputy Attorney General,
Attorneys for Defendant.

Endorsed: Filed Aug. 30, 1915. B. Grant Taylor, Clerk, by Erb, Deputy.

163 [Endorsed:] Copy. No. 2081. Sacramento. In the Supreme Court of the State of California. Deseret Water, Oil and Irrigation Company, a Corporation, Plaintiff and Respondent, vs. The State of California, Defendant and Appellant. Assignment of Errors on Writ of Error to State Court. U. S. Webb, Attorney General, Attorney for Defendant, 1212 Humboldt Building, San Francisco, California.

164 In the Supreme Court of the State of California.

Sacramento, No. 2081.

DESERET WATER, OIL AND IRRIGATION COMPANY, a Corporation, Plaintiff and Respondent,

vs.

THE STATE OF CALIFORNIA, Defendant and Appellant.

Allowance of Writ of Error.

Now comes the State of California on this 30th day of August, 1915, and files and presents to this Court its petition for the allowance of a Writ of Error intended to be urged by it, and praying further that a duly authenticated transcript of the records, proceedings and papers upon which the judgment herein was rendered may be sent to the Supreme Court of the United States; and that such other and further proceedings may be had in the premises as may be just and proper.

It is ordered that a Writ of Error be allowed as prayed, provided, however that the said State of California give bond according to law in the sum of Five Hundred ($500) Dollars, which said bond shall operate as a supersedeas bond, and which bond may be executed in the name of said State by U. S. Webb, the duly authorized, qualified and acting Attorney General of said State, and counsel for said State herein.

In testimony whereof, witness my hand this 30th day of August, 1915.

F. M. ANGELOTTI,
Chief Justice of the Supreme Court of the State of California.

Endorsed: Filed Aug. 30, 1915. B. Grant Taylor, Clerk, by Erb, Deputy.

165 [Endorsed:] No. 2081. Sacramento. In the Supreme Court of the State of California. Deseret Water, Oil and Irrigation Company, a Corporation, Plaintiff and Respondent, vs. The State of California, Defendant and Appellant. Allowance of Writ of Error. U. S. Webb, Attorney General, Attorney for Defendant, 1212 Humboldt Building, San Francisco, California.

166 In the Supreme Court of the State of California.

Sacramento, No. 2081.

DESERET WATER, OIL AND IRRIGATION COMPANY, a Corporation, Plaintiff and Respondent,

vs.

THE STATE OF CALIFORNIA, Defendant and Appellant.

Bond on Writ of Error.

Know all men by these presents that we the State of California, by and through U. S. Webb the duly elected, qualified and acting Attorney General, as principal, and The Ætna Accident and Liability Company, a corporation, duly organized under the laws of the State of Connecticut and authorized by the laws of the State of California to act as surety on bonds within the State of California, and having its principal place of business in the City and County of San Francisco, State of California, as surety, are held and firmly bound unto the Deseret Water, Oil and Irrigation Company, a corporation, in the sum of Five Hundred ($500.) Dollars to be paid by them, and for the payment of which well and truly to be made, we bind ourselves and each of us and each of our successors and assigns jointly and severally by these presents.

Sealed with our seals, and dated the Second day of September, in the year of our Lord One thousand nine hundred and fifteen.

Whereas the above-named State of California seeks to prose-
167 cute its Writ of Error in the Supreme Court of the United States, to reverse the judgment rendered in the above entitled action or proceeding by the Supreme Court of the State of California,

Now, therefore, the condition of this obligation is such that if the above named defendant in error shall prosecute its Writ of Error to effect, and answer all costs and damages that may be adjudged, if it shall fail to make good its plea, then this obligation to be void, otherwise to remain in full force and effect.

STATE OF CALIFORNIA,
By U. S. WEBB, *Attorney General of said State.*
THE ÆTNA ACCIDENT AND LIABILITY COMPANY (*A Corporation*),
By G. D. STUART, *Resident Vice-President.*

Attest:
[SEAL.] W. T. BARR,
Resident Ass't Secretary.

The above bond is hereby approved this 4th day of September, 1915.

F. M. ANGELOTTI,
Chief Justice of the Supreme Court of the State of California.

Endorsed: Filed Sept. 4, 1915. B. Grant Taylor, Clerk.

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

On this 2nd day of *D*eptember in the year One Thousand Nine Hundred and Fifteen before me, James Mason, a Notary Public in and for said City and County, residing therein, duly commissioned and sworn, personally appeared G. D. Stuart and W. T. Barr known to me to be the Resident Vice President and Resident Ass't Secretary, respectively of The Ætna Accident and Liability Company the corporation described in and that executed the within instrument, and also known to me to be the persons who executed it on behalf of the Corporation therein named, and they acknowledged to me that such Corporation executed the same.

In witness whereof, I have hereunto set my hand and affixed my official seal, at my office, in the said City and County of San Francisco, the day and year in this certificate first above written.

[SEAL.] JAMES MASON,
Notary Public in and for the City and County of San Francisco, State of California.

My Commission will expire December 4th, 1915.

168 [Endorsed:] No. 2081. Sacramento. In the Supreme Court of the State of California. Deseret Water, Oil and Irrigation Company, a Corporation, Plaintiff and Respondent, vs. The State of California, Defendant and Appellant. Bond on Writ of Error. U. S. Webb, Attorney General, Attorney for Defendant, 1212 Humboldt Building, San Francisco, California.

169 Original.

In the Supreme Court of the State of California.

Sacramento, No. 2081.

DESERET WATER, OIL AND IRRIGATION COMPANY, a Corporation, Plaintiff and Respondent,

vs.

THE STATE OF CALIFORNIA, Defendant and Appellant.

Writ of Error.

UNITED STATES OF AMERICA, ss:

The President of the United States to the Honorable Justices of the Supreme Court of the State of California, Greeting:

Because in the records and proceedings, as also in the rendition of the judgment and decision in the above entitled matter in the Supreme Court of the State of California, before you on the 20th day of January, 1914, and on the 19th day of February, 1914, and said Court being the highest Court of law and equity of said

State in which decision could be had in the said matter wherein the Deseret Water, Oil and Irrigation Company, a corporation, was plaintiff and respondent, and the State of California was defendant and appellant, and wherein was drawn in question the validity of authority exercised under said State on the ground that said authority was repugnant to the laws of the United States of America,
and the orders, rulings and authority of the officers thereof,
170 and the decision of said Court was against such authority of
said State and against such authority of said United States of America and the officers and departments thereof; a manifest error has happened to the great damage of the said State of California, as by the petition for Writ of Error and the record in said matter fully appears.

We being willing that error, if any has happened, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly you send the record and proceeding aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington within sixty days from the date hereof, that the records and proceedings aforesaid being inspected the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness; the Hon. Edward Douglass White, Chief Justice of the United States, this 4th day of September, 1915.

[Seal of the U. S. District Court, Northern Dist. of California.]

WALTER B. MALING,
Clerk U. S. District Court, Northern District of California.

Done in the City and County of San Francisco, with the seal of the District Court of the United States, Northern District of California attached.

WALTER B. MALING,
Clerk of the United States District Court,
Northern District of California.

Allowed:
F. M. ANGELOTTI,
Chief Justice of the Supreme Court
of the State of California.

171 [Endorsed:] Original. No. 2081. Sacramento. In the Supreme Court of the State of California. Deseret Water, Oil and Irrigation Company, a Corporation, Plaintiff and Respondent vs. The State of California, Defendant and Appellant. Writ of Error. U. S. Webb, Attorney General, Attorney for Defendant, 1212 Humboldt Building, San Francisco, California. Filed Sep. 3, 1915. E. Grant Taylor, Clerk, by Erb, Deputy.

172 Original.

In the Supreme Court of the State of California.

Sacramento, No. 2081.

DESERET WATER, OIL AND IRRIGATION COMPANY, a Corporation, Plaintiff and Respondent,

vs.

THE STATE OF CALIFORNIA, Defendant and Appellant.

Citation.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to Deseret Water, Oil and Irrigation Company, a Corporation:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington, D. C., within sixty days from the date hereof, pursuant to writ of error filed in the office of the Clerk of the Supreme Court of the State of California in the matter of Deseret Water, Oil and Irrigation Company, a corporation, vs. State of California, wherein the State of California is designated as Plaintiff in Error and Deseret Water, Oil and Irrigation Company, a corporation, is designated as Defendant in Error, to show cause, if any there be, why the judgment rendered in said matter, as in said writ of error mentioned, should not be corrected and whether speedy justice should not be done the parties in that behalf.

173 Witness the Chief Justice of the Supreme Court of the State of California, this 4th day of September, 1915.

F. M. ANGELOTTI,
Chief Justice of the Supreme Court of the State of California.

Attest:

[Seal Supreme Court of California.]

B. GRANT TAYLOR,
Clerk of the Supreme Court of the State of California.

174 [Endorsed:] Original. No. 2081. Sacramento. In the Supreme Court of the State of California. Deseret Water, Oil and Irrigation Company, a Corporation, Plaintiff and Respondent, vs. The State of California, Defendant and Appellant. Citation. U. S. Webb, Attorney General, Attorney for Defendant, 1212 Humboldt Building, San Francisco, California. Filed Sep. 3, 1915. B. Grant Taylor, Clerk, by Erb, Deputy.

175 SUPREME COURT, STATE OF CALIFORNIA, *ss:*

I, B. Grant Taylor, Clerk of the above entitled Court do hereby certify that the foregoing document-, to-wit: transcript on appeal,

filed in the District Court of Appeals, in and for the Third Appellate District; application for hearing and determination of cause by the Supreme Court, after decision of said District Court of Appeals, containing as exhibit "A" thereof, a copy of the opinion of said District Court; order granting application for hearing; opinion of the Supreme Court of California, containing therein the final judgment and order of said Supreme Court; petition for rehearing in said Supreme Court; order denying said petition for rehearing, with modification of opinion, are full, true and correct copies of the originals of such documents, and of the record and proceeding in this court, in the case of Deseret Water, Oil and Irrigation Company, a corporation, Plaintiff and Respondent, vs. The State of California, Defendant and Appellant, and that attached hereto are full, true and correct copies of the petition for writ of error, assignment of errors, allowance of writ of error, bond on writ of error, and the original writ of error and citation, filed in my office in said case.

In witness whereof, I hereunto set my hand and affix the seal of said court, at my office in San Francisco, California, this 4th day of October, A. D. 1915.

[Seal Supreme Court of California.]

B. GRANT TAYLOR,
Clerk of the Supreme Court of the State of California.

176 In the Supreme Court of the State of California.

Sacramento, No. 2081.

DESERET WATER, OIL AND IRRIGATION COMPANY, a Corporation, Plaintiff and Respondent,

vs.

THE STATE OF CALIFORNIA, Defendant and Appellant.

Service of copies of the following papers in the above entitled action is hereby admitted this 14th day of September, 1915, and notice of the Writ of Error taken herein is hereby admitted.

Petition for Writ of Error to the Supreme Court of the United States;
Assignment of Errors on Writ of Error to State Court;
Allowance of Writ of Error;
Writ of Error;
Bond on Writ of Error;
Citation.

A. H. RICKETTS,
Attorneys for Plaintiff and Respondent in Error.

Endorsed on cover: File No. 24,962. California Supreme Court. Term No. 269. The State of California, plaintiff in error, vs. Deseret Water, Oil and Irrigation Company. Filed October 25, 1915. File No. 24,962.

SUBJECT INDEX.

INDEX OF CITATIONS.

No. 24,962.

IN THE

Supreme Court of the United States

October Term, 1916.

No. 269.

THE STATE OF CALIFORNIA,
Plaintiff in Error,

vs.

DESERET WATER, OIL AND IRRIGATION COMPANY, A CORPORATION,
Defendant in Error.

ARGUMENT IN OPPOSITION TO MOTION TO DISMISS AND TO AFFIRM.

The defendant in error has moved to dismiss the writ of error on file herein upon the grounds that this court is without jurisdiction and that the writ of error is "informal, irregular and insufficient."

I.

THE QUESTION OF JURISDICTION.

The point at issue in this proceeding is: Do sections 2275 and 2276 of the United States Revised Statutes, as amended in 1891, authorize the exchange

of school lands which were surveyed before they were included in the National Forest Reserve? More generally the question is whether when a state, which is the beneficiary of a school land grant from the United States, has by appropriate legislation withdrawn from sale such sixteenth and thirty-sixth sections as lie within national reservations and has by appropriate legislation declared that such sections shall be used only as bases for indemnity selections, the land so withdrawn may be condemned in eminent domain proceedings, particularly when such proceedings have been brought after the state has used the lands as contemplated in the legislation, and the selection of such lands as bases has been accepted by the local United States land offices.

The state court conceded that the lands could not be so condemned if the federal authorities had the power to accept such selections and to exchange such sections for other unappropriated government lands outside of the forest reservations, but held that the federal authorities did not have such power if the section, as was the case here, was surveyed before the federal reservation was created. It was conceded that the laws of the state were ample and sufficient to effect the exchange of such lands, but the state court held that in so far as these surveyed sections were concerned, the state laws were ineffective because of the want of power in the federal authorities to act in that connection on behalf of the federal government. There was, therefore, clearly drawn in

issue in the state court the question of "an authority exercised under the United States," and there was also drawn in question a "title, right, privilege * * * claimed under * * * a statute of * * * *or authority exercised under,* the United States," and the decision was against the claim so set up and against the validity of the authority exercised under the statutes of the United States. It is therefore a question which clearly comes within the purview of section 237 of the Judicial Code. It only remains to be determined whether the question was properly presented before the state courts.

The action originated in a complaint filed by the corporation against the state of California to condemn all of section 16, township 1 north, range 25 east, M. D. B. and M., which admittedly was a section of school land granted to the state of California by the United States, and which was surveyed prior to the time when it was included within the boundaries of the Mono Forest Reserve, a national reservation established by proclamation of the President. In the trial court the state set up by answer that the lands sought to be condemned were not subject to condemnation because they were situated within the boundaries of a national forest reservation (Trans. p. 4, folio 7). It was admitted at the trial that these lands were all within the Mono Forest Reserve (Trans. p. 4, folio 58). It was then shown by the state that the lands, being within a national forest reservation, had been withdrawn from sale and *could*

be used as bases for indemnity selections only; that at least six hundred acres of the land sought to be condemned had been offered as bases for such selections, and scrip covering all of such six hundred acres had actually been sold at public auction to various individuals, none of whom were made parties to the action; that these certificates were sold for prices ranging from $2.80 to $3.45 per acre; that these certificates were issued on May 3, 1909, two years prior to the commencement of this action (June 23, 1911); and that the selections had all been accepted by the local United States land offices. As to the remaining forty acres it was shown that an indemnity certificate thereon was still outstanding (Trans. pp. 27 and 28, folios 58–60).

After judgment against the state an appeal was taken to the District Court of Appeal of the Third Appellate District. Among the assignments of error therein made is one numbered six, which reads as follows:

> "6. The evidence does not prove or show that no part of said land has heretofore been appropriated to any public use" (Trans. p. 29, folio 63).

On the hearing before the court of appeal the state contended that the lands involved had been withdrawn from operation of eminent domain proceedings because, situated within a forest reserve, they could be used only as bases for indemnity selections, and that for the same reason they were devoted to

another public use and hence not subject to condemnation.

To understand the position of the state it is necessary to examine briefly the state statutes involved.

Section 3408*b* of the California Political Code, which was added to the code by the Statutes of 1909, page 682, provides, in part, as follows:

> "All sixteenth and thirty-sixth sections, *both surveyed and unsurveyed,* which may now or may hereafter be included within the exterior boundaries of a national reservation, or of a reserve, or within the exterior boundaries of lands withdrawn from public entry, shall be and are hereby withheld from sale by the state, *and the same shall hereafter be used only as bases for indemnity selections* as in this article provided." [Emphasis ours.]

Section 1240 of the Code of Civil Procedure read at the time of these proceedings, in part, as follows:

> "The private property which may be taken under this title (eminent domain) includes:
>
> 2. Lands belonging to this state * * * not appropriated to some public use. * * *
>
> 3. Lands belonging to the United States or owned or held by the United States in trust, or otherwise, for any purpose, except, etc."

Section 1248 of the Code of Civil Procedure provides, in part, that the court must ascertain "the value of the property sought to be condemned * * * and each and every separate estate or interest therein."

Relying upon the provisions of the California statutes, the state contended before the court of appeal that the lands, being located wholly within a national forest reservation, were not subject to condemnation because devoted to the public use—or more particularly to two separate uses—the state had devoted them to its use as bases for indemnity selections, and the United States had devoted them to its public use of the forest reserve.

There is no warrant for the claim that this defense was waived by failure of the state to specifically deny the allegations of the complaint that the lands were not devoted to a public use. The allegation was a mere conclusion of law which is not admitted by failure to deny, under California practice. The state alleged the existence of the forest reservation and the inclusion of the lands within it. If, then, the state's position is correct, the lands were, as a matter of law, appropriated to a public use by reason of being within a forest reservation. If the state's position is not correct, no allegation of fact would change the legal conclusion. The failure to deny an allegation impossible in law is not an admission of the truth of the allegation.

People vs. *Roach*, 76 Cal. 296;
State vs. *Miller*, 149 Cal. 208;
Louisville, etc., Co. vs. *Palmes*, 109 U. S. 255.

Thus if sections 2275 and 2276 of the Revised Statutes contained the necessary authority to effect the exchange of these surveyed lands, they were, as

a matter of law, appropriated to a public use, and no denial of the allegation of the complaint was necessary. In accordance with the understanding between the state and the federal authorities to exchange unsold school lands in forest reserves the act of 1909 known as the Thompson Act was added to the California Political Code and numbered sections 3398 to 3409, inclusive. This act, in general terms, withdrew from sale all sixteenth and thirty-sixth sections situated within the boundaries of a national reserve, *whether surveyed or unsurveyed,* and authorized the state authorities to sell scrip upon such sections at public auction, which scrip enabled the holder to select other lands of equal area outside of the forest reserve in lieu of the school section situated within the forest reserve, and provided that as soon as the listing of the lieu selections was made the title to the bases passed to the federal government. The state act depended for its enforcement upon the authority of the government land office to effect the exchange of these selections. The federal law upon which the act depended is found in sections 2275 and 2276 of the Revised Statutes of the United States, as amended in 1891.

> "In substance those sections declare that when any of these school sections so conveyed to a state are lost to the state, either by superior claims of homestead or pre-emption settlers, or because they are mineral lands, or because they are included within any Indian, military, or other reservation, or because they are otherwise disposed

of by the United States 'other lands of equal acreage are hereby appropriated and granted and may be selected by said state in lieu of such as may be thus' lost."

Opinion Supreme Court in *Deseret, etc., Co.* vs. *State of California,* 167 Cal. 147–153.

When the matter was presented to the court of appeal no question was made of the authority of the United States Land Office to accept the exchanges or to carry out the plan of the state law above noted. The provisions of the state law were deemed sufficient and controlling by both parties and the court of appeal sustained the state's contention that the provisions of section 3408*b* above noted withdrew these lands from the operation of the eminent domain statutes and that court reversed the judgment of the trial court. The court also held that because of section 1248 of the Code of Civil Procedure requiring the trial court to determine the interest of all parties in the lands sought to be condemned, a judgment could not be entered in this case without giving to the United States an opportunity to be heard in support of the interest which it had in the lands.

Thereafter, as stated in the argument of defendant in error, the provisions of sections 2275 and 2276 of the United States Revised Statutes were called to the attention of the state supreme court by the defendant in error herein in its petition for a hearing in that court after the decision of the court of appeal.

The purpose of directing attention to these sections was to show a want of authority *on the part of the federal authorities* to exchange these lands because the section had been surveyed before the forest reserve was created.

The power of the federal authorities to do so was assumed by both parties at all stages of the proceedings up to that time. Section 3408*b* of the Political Code withdraws from sale and authorizes the exchange of all sixteenth and thirty-sixth sections "both surveyed and unsurveyed." The action of the federal and state authorities in arranging to exchange this section was never attacked or questioned by defendant in error and their authority to do so was never contested until this petition for rehearing in the state supreme court was filed.

It was assumed by all parties that the power to carry out the provisions of section 3408*b* existed—the state making the contention that the lands, being within the forest reserve, were, upon the creation of the reserve, devoted to a public use, the use for indemnity purposes, and that scrip having been sold thereon and lieu selections having been accepted by the federal land office prior to the institution of this action, the United States had at least an equitable interest in the lands and the same were therefore devoted to the public uses of the forest reserve. Both sides assumed that the argument applied to surveyed as well as unsurveyed sections. Defendant in error

denied that a public use existed. The state claimed that the creation of a forest reserve thereby appropriated to public use all lands situated therein under the control of the national government, and this contention was supported by the decision of this court in

Light vs. *United States,* 220 U. S. 523,

and by the subsequent decision of the state supreme court in

Deseret, etc., Co. vs. *California,* 167 Cal. 147.

In other words, the state supreme court sustained the contention of the state that a public use existed when the lands were included within a national forest reserve, but held that these particular lands, not having come within the control of the national government *because they were surveyed lands,* were not appropriated to that public use.

Thus the decision of the court of appeal which was favorable to the state was set aside by the supreme court and the opinion of the supreme court thereafter rendered adversely to the state was based upon the interpretation of sections 2275 and 2276 of the United States Revised Statutes, given by the state supreme court in response to the petition for hearing therein. If, then, the defendant in error had not raised the question of the want of power of the federal officers the decision of the court of appeal in favor of the state would have become final.

The basis of the opinion of the supreme court is found on pages 54 and 55, folio 123 of the transcript, where the court said:

> "By appellant it is contended that notwithstanding the title to such a section has absolutely vested in it before the creation of a forest federal reservation, it has elected to surrender such section to the United States, seeking indemnity and compensation therefor under the federal indemnity grant provided for in the above cited sections of the federal statutes. And further the state contends that this federal grant is broad enough to include such selections as indemnity selections and that the interior department of the United States so construes the law. Furthermore, that the state has taken the appropriate step in the various federal land offices to accomplish this desired result, so that the present status of these lands is that the state has offered them to the United States in exchange for other equivalent public lands belonging to the general government. Therefore, the conclusion is that the state has, at least in equity, parted with its title, which title in equity is reinvested in the United States.
>
> If appellant's position in this matter is sound there is an end to the controversy and the trial court erred in awarding a judgment in condemnation."

The quotation found on page nine of the affidavit of A. H. Ricketts, filed with his argument upon this motion and taken from the petition for rehearing filed by the plaintiff in error with the state supreme

court, was used in reference to the concluding portion of the state court's opinion attacking the power of the federal authorities to create these forest reserves, and had no connection with and was not a waiver of any claims made by the state as to the proper interpretation of sections 2275 and 2276 of the Revised Statutes of the United States.

In the briefs filed by the state in the supreme court it was argued that the departmental rulings of the department of the interior clearly showed that that department construed sections 2275 and 2276 as applying to surveyed, as well as to unsurveyed, sections. To this point the following decisions of that department were cited:

In re State of California, 28 Land Dec. 57;
In re Terr. of New Mexico, 29 Land Dec. 364;
Dunn vs. *State of California,* 30 Land Dec. 608;
In re State of California, 34 Land Dec. 613.

Defendant in error relied on the decision of the United States Circuit Court in

Hibbard vs. *Slack,* 84 Fed. 571,

which the state answered was not controlling because neither the state nor the federal authorities were parties to that action. The state also relied upon the decision of this court in

Weyerhaeuser vs. *Hoyt,* 219 U. S. 380,

to the effect that the decisions of the department of the interior in this regard were controlling.

The supreme court denied the authority of the federal officers to effect the exchange of surveyed

lands, though holding that if the state's claim that this authority did exist was sound, then the judgment of the trial court should have been reversed. No matter how the federal question may have been raised, it is clear from the reading of the opinion of the state supreme court that if that federal question had not been determined adversely to the claim of the state, a different judgment would have resulted. The position of defendant in error on this motion is that having raised a federal question in the state court itself and having procured a favorable final judgment in the state court through the determination of such federal question adversely to the plaintiff in error, this court has no jurisdiction to review the judgment because the federal question was not raised in the first instance by plaintiff in error. But we do not concede the claim of defendant in error, but contend that the federal question was put in issue by the plaintiff in error at the time of the trial of the action in the trial court.

That the state supreme court treated the federal question as properly before it is clear from the concluding paragraph of the opinion, which reads:

> "Finally it may be said that if the state shall believe its rights or interests to be affected by the adoption of the decisions of the federal courts in the construction of the federal statute, which is indisputably a matter of much moment, the path is clear to the supreme court of the United States, where the true and final construction of the statute will be given and all doubts put to rest."

Under these circumstances it can not be doubted that the federal question was raised before the state court and was so treated by the state court and was decided adversely to the right or privilege claimed by the state under the federal statute.

Mallinckrodt vs. *St. Louis,* 238 U. S. 41–49;
Carlson vs. *Curtis,* 234 U. S. 103–106;
Mierdreich vs. *Lauenstein,* 232 U. S. 236–243;
Atchison, Topeka & Santa Fe R. R. vs. *Sowers,* 213 U. S. 55–63;
Supreme Lodge of K. of P. vs. *Mims,* U. S. Advance Op. 1915—702–704;
Land and Water Co. vs. *San Jose Ranch Co.,* 189 U. S. 177–179.

Though independent state grounds were also presented to the state court, it is evident that the judgment would have been reversed if the court had not determined the federal question adversely to the claim of the state, as appears from its opinion:

> "If appellant's position in this matter be sound there is an end to the controversy and the trial court erred in awarding a judgment in condemnation."

When the court decides against plaintiff in error upon a federal question which it deems to have been properly brought before it, this court has jurisdiction to review the judgment.

Rogers vs. *Hennepin County,* 240 U. S. 184–188.

And even though the pleadings do not in terms refer to a federal statute as determining the liability, if the state court has denied the liability under the federal statute this court has jurisdiction to review the judgment.

Jones National Bank vs. *Yates,* 240 U. S. 541–550;

Thomas vs. *Taylor,* 224 U. S. 73, 78, 79;

Grand Trunk Railway vs. *Lindsay,* 233 U. S. 42–48.

Here the state court accepted the state's contention that the statutes of the state were ample and sufficient to effect the exchange and transfer and that if such transfer had been made as contemplated by the state statutes, then the judgment against the state would have to be reversed, but the court held that the transfer had not been effected solely because of the want of authority in the federal officers. In other words, the reversal of the judgment depended upon the holding that the federal officers were without power to do what they had done and claimed the right to do under the federal statutes. The state showed that the plan adopted was one beneficial to the state because it was thereby enabled to dispose of lands at considerable profit, which otherwise it was not able to dispose of at all.

Whether a federal question has been properly raised in the state courts is a question of state practice, and if the highest court of the state "either

decided or assumed that the records sufficiently presented a question of federal right and decided against the party asserting that right, the decisions of this court render it clear that it is our duty to pass upon the merits of the federal question."

North Carolina Railroad Co. vs. *Zachary,* 232 U. S. 248–257;

Home for Incurables vs. *City of New York,* 187 U. S. 155–167;

Land & Water Co. vs. *San Jose Ranch Co.,* 189 U. S. 177–179;

Haire vs. *Rice,* 204 U. S. 291–299;

Chambers vs. *Balt. & Ohio R. R.,* 207 U. S. 142–148;

Miedreich vs. *Lauenstein,* 232 U. S. 236.

II.

SUFFICIENCY OF WRIT OF ERROR.

Counsel for defendant in error has not pointed out wherein the writ of error is "informal, irregular and insufficient." No particular form of a writ of error is prescribed by statute. So long as it requires the certification of the record to this court and such result is obtained, there can be no objection to the form or regularity of the writ. And so long as the officers to whom it is directed understand its purport and the required record is secured, there can be no objection by defendant in error to the sufficiency of the writ.

Upon the foregoing it is respectfully submitted that the motion to dismiss and affirm should be denied.

U. S. WEBB,
Attorney General,
State of California,
JOHN T. NOURSE,
Deputy Attorney General,
State of California,
Attorneys for Plaintiff in Error.

In the Supreme Court of the United States

THE STATE OF CALIFORNIA,
Plaintiff in Error,
v.
DESERET WATER, OIL & IRRIGATION COMPANY, a corporation,
Defendant in Error.

Term No. 269
(File No. 24,962)
October Term 1916

MOTIONS TO DISMISS AND TO AFFIRM.

Comes now Deseret Water, Oil & Irrigation Company, a corporation, the defendant in error, by A. H. Ricketts, its counsel, and moves this court to dismiss and quash the paper purporting to be a writ of error herein for want of jurisdiction and because the paper purporting to be a writ of error is informal, irregular and insufficient.

And the said defendant in error also moves this court to affirm the judgment of the Supreme Court of the State of California herein upon the ground that it is manifest that the paper purporting to be a writ of error herein was taken for delay only, and

that the question upon which it is claimed that the jurisdiction depends is so frivolous as not to need argument.

A. H. RICKETTS,
Attorney and Counsel for Defendant in Error.

In the Supreme Court of the United States.

THE STATE OF CALIFORNIA, *Plaintiff in Error,* v. DESERET WATER, OIL & IRRIGATION COMPANY, a corporation, *Defendant in Error.*	Term No. 269 (File No. 24,962) October Term 1916

NOTICE OF SUBMISSION OF MOTIONS TO DISMISS AND TO AFFIRM.

Gentlemen:

Please take notice that on the annexed verified statement of facts herein, and on all the papers and proceedings herein, I shall submit to the Supreme Court of the United States at a stated term thereof, on Monday, the twenty-seventh day of November, 1916, at the capitol, in the City of Washington, in the District of Columbia, at the opening of the court on that day, or as soon thereafter as counsel can be heard, the motions of which the foregoing are copies; and that I shall submit with said motions and in support of the same the argument annexed to said statement of facts.

San Francisco, California,
October 25th, 1916.

Yours etc.,

A. H. RICKETTS,
Attorney and Counsel for Defendant in Error.

40 California Street,
San Francisco, California.

To U. S. WEBB, ESQ.,
Attorney General of California,
JOHN T. NOURSE, ESQ.,
Deputy Attorney General,
Attorneys for Plaintiff in Error,
Humboldt Bank Building,
San Francisco.

In the Supreme Court of the United States.

THE STATE OF CALIFORNIA, *Plaintiff in Error,* v. DESERET WATER, OIL & IRRIGATION COMPANY, a corporation, *Defendant in Error.*	Term No. 269 (File No. 24,962) October Term 1916

STATEMENT OF FACTS.

United States of America,
State of California,
City and County of San Francisco. } ss.

A. H. RICKETTS, being duly sworn, deposes and says: I reside in the City of Berkeley, County of Alameda, and State of California. I am the President of Deseret Water, Oil & Irrigation Company, which is the defendant in error above named.

On or about the 23rd day of June, 1911, a complaint in eminent domain by the above named defendant in error against the State of California, the plaintiff in error above named, was filed in the Clerk's office of the Superior Court of the State of California in and for the County of Mono. A copy of said complaint is hereto annexed, marked "A." Said complaint prays as follows:

> "That the Court will ascertain and assess the value of the property herein sought to be condemned; that said land be condemned to said proposed public use, to wit: for the public use

of said plaintiff, and that plaintiff may have such other or further relief as may be meet in the premises."

An answer traversing some of the material allegations of said complaint was duly filed by the said The State of California to said Complaint. Other material allegations in said complaint were admitted by failing to deny the same in said answer.

The case came on for trial in the said Superior Court and on or about the 10th day of January, 1912, judgment for the condemnation of the land was duly entered in favor of the defendant in error herein, a copy of which said judgment is hereunto annexed, marked "B." Judgment concluded as follows:

> "It is ordered, adjudged and decreed that the plaintiff take and acquire and have for its own use in fee for the purpose of preserving and maintaining water rights, water sheds and sources, equipping, operating and maintaining canals, laterals, aqueducts, flumes, tunnels, ditches, pipes and pipe lines with all their appurtenances for supplying, selling and distributing water power * * * for drainage, reclamation and irrigating land and of constructing, equipping, operating and maintaining ditches, reservoirs, dams, tunnels, levees, viaducts, bridges, embankments, excavations and the sites therefor, for the collection, storage, sale and distribution of water, and for constructing, operating and maintaining pumps and pumping plants, electric lighting and power plants, electric and power lines, oil pipe lines, and all the necessary appurtenances thereto, and for the generation and distribution of electric light and

power * * * by means of poles, wires, conduits and subways or otherwise over, through and across * * * * that certain tract of land situate, lying and being in the county of Mono, State of California, and more particularly described as follows, to wit:

Section Sixteen (16), Township One (1) North Range Twenty-five (25) East, Mt. Diablo Meridian, containing Six hundred and forty (640) acres of land, and that the plaintiff pay as compensation and damages to the said defendant * * * the sum of Six hundred and forty ($640.00) dollars for said tract of land * * * ."

Subsequently thereto the said defendant, the State of California, duly appealed from the said judgment to the District Court of Appeals of said State in and for the Third Appellate District. Said appeal duly came on to be heard. Subsequently thereto and on or about the 26th day of November, 1912, the said District Court of Appeals, after argument on behalf of both parties thereto, duly rendered its decision and reversed the judgment of the said Superior Court.

Subsequently the defendant in error herein presented a petition to the Supreme Court of the State of California to grant a hearing to the Supreme Court of the State of California of the above entitled cause upon the decision of the District Court of Appeal in and for the Third Appellate District of the said State after decision rendered therein. By the terms of which decision the judgment theretofore rendered by the Superior Court of the State of

California in and for the County of Mono in favor of the defendant in error herein and against said plaintiff in error herein, and the order of said Superior Court denying said motion for a new trial of said action made by the said plaintiff in error was reversed.

Subsequently and on or about the 24th day of January, 1913, said Supreme Court made an order granting said petition for hearing in Supreme Court after judgment in the District Court of Appeal.

Said hearing duly came on to be heard. Subsequently thereto and on or about the 20th day of January, 1914, the said Supreme Court, after argument on behalf of both parties thereto, duly rendered its decision and reversed the judgment of the said District Court of Appeal.

In the body of that decision the court said:

> "(5) * * * While the State of California has by appropriate legislation offered to exchange such lands for other lands of the United States, there is no law of the United States authorizing such an exchange and no act of Congress taken in contemplation of any such exchange, present or future. Therefore the position of our State law (Act of 1911) that these sections may be used as 'bases for indemnity selections provided by law' is without any present efficacy by reason of the fact that there is no law of the United States either authorizing indemnity selections in such cases, or authorizing an exchange of lands in any other way.
>
> To the further argument upon this matter, that the State has already sold scrip based upon such proposed indemnity selections, the answer

> is found in the State statute above quoted. The purchaser is entitled to a restitution of his money upon the failure of the United States to make provision for the exchange."

Subsequently and on or about the.....day of February, 1914, the plaintiff in error herein filed its petition for rehearing in the said Supreme Court. In the course of said petition for rehearing it is said:

> "All that has been said in the opinion of the Supreme Court of the State relating to the want of power of the Federal authorities to accept the grant, has no application to the case before us. It has never been contended and cannot seriously be contended that the legislature of this State is without power to withdraw these school lands from sale and condemnation, and to hold such lands intact for the purpose of transferring them to the Federal Government in exchange for other lands from which a revenue may be derived by the State, and the mere fact that the Federal Government had not by Congressional action, expressly authorized the acceptance of a transfer at the time of the legislative act, cannot affect the validity of that act or affect the withdrawal of the lands pending such time as the said act may become effectual."

Subsequently and on or about the 19th day of February, 1914, said petition for rehearing was denied.

Subsequently and on or about the 30th day of August, 1915, the plaintiff in error herein filed its petition for writ of error to the Supreme Court of the United States together with its assignment of errors on writ of error to the State court.

Subsequently and on the day last aforesaid the

Supreme Court of the State of California allowed said writ of error.

Subsequently and on or about the 4th day of September, 1915, the writ of error herein was issued. It is recited therein that in the decision in the above entitled matter in the Supreme Court of the State of California on the 20th day of January, 1914, that there "was drawn in question the validity of the authority exercised under said State on the ground that said authority was repugnant to the laws of the United States of America, and the orders, rulings and authority of the officers thereof, and the decision of said court was against such authority of said State and against such authority of said United States of America and the officers and departments thereof; a manifest error has happened to the great damage of the said State of California, as by the petition for Writ of Error and the record in said matter fully appears."

Said writ of error has been docketed and is now pending on the calendar of this court and is number 269 on the calendar for the October Term, 1916. Its file number is 24,962. A citation thereunder has been served upon Deseret Water, Oil & Irrigation Company.

A. H. RICKETTS.

Subscribed and sworn to before me, this 25th day of October, 1916.

FLORA HALL,
Notary Public
[SEAL] in and for the City and County of San Francisco, State of California.

"A"

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF MONO.

DESERET WATER, OIL & IRRIGATION COMPANY, a Corporation, *Plaintiff,* vs. THE STATE OF CALIFORNIA, JOHN DOE, RICHARD ROE and PETER PINK, *Defendants.*	Complaint in Condemnation

---

The plaintiff complains of defendants and for cause of action alleges:

I.

That plaintiff is a corporation organized and existing under and by virtue of the laws of the State of Nevada and engaged in and authorized to do business within the State of California, under and by virtue of the laws thereof; that the name of the plaintiff is Deseret Water, Oil & Irrigation Company.

II.

That in and by its Articles of Incorporation the plaintiff was and is authorized and empowered,

among other things, to acquire, purchase, sell, preserve and maintain water rights, water sheds and sources; to acquire, purchase, sell, lease, equip, operate and maintain canals, laterals, aqueducts, flumes, tunnels, ditches, pipes and pipe lines and all their appurtenances for supplying, selling and distributing water and power to mines, farming neighborhoods, precincts, cities, towns, villages and other municipal divisions and to corporations or individuals for drainage, reclamation and irrigating lands; to acquire, purchase, sell, lease, construct, equip, operate and maintain ditches, reservoirs, dams, tunnels, levees, viaducts, bridges, embankments, excavations and the sites therefor for the collection, storage, selling and distribution of water; to acquire, purchase, sell, lease, construct, equip, operate and maintain pumps and pumping plants, electrical lighting and power plants, electric light and power lines, oil pipe lines and all the necessary appurtenances thereto; to acquire, purchase, sell, mortgage, lease, exchange, hold and condemn real property and all estates of whatsoever nature and description for the purpose of marketing, selling, storing, furnishing and transporting water, light, power, heat, petroleum oil and natural gas to such places as this corporation may think necessary or convenient for the purposes of its business; to engage in and carry on the business of boring for, producing, refining, distributing, treating, manufacturing, piping, carrying, handling, storing, owning, holding, buying, and selling petroleum oil, natural gas, asphalt, bitu-

men, bituminous rock and other mineral and hydrocarbon substances and for such purposes to buy and otherwise acquire, hold, own, manage and operate refineries, pipe lines, tanks, manufactories, machinery, wharves, tank cars, steam and sailing vessels for water transportation and other works, property and appliances that may be incidental or auxiliary to said business or which this corporation may think necessary or convenient for the purposes of its business; to control, lease, and obtain rights of way, easements and franchises for the purpose of marketing, selling, storing, furnishing and transporting water, light, power, heat, petroleum oil and natural gas to such places as this corporation may think necessary or convenient for the purposes of its business; to generate, vend and distribute electric light and power to such places as this corporation may think necessary or convenient for the purposes of its business, by means of poles, wires, conduits and sub-ways, or otherwise, over and through other lands or water, or both, if the purpose of this corporation may so require.

III.

That the defendants are the State of California, John Doe, Richard Roe and Peter Pink, and said defendants claim to be the owners and claimants of the property sought to be condemned under these proceedings, to wit: Section Sixteen (16), Township One (1) North, Range Twenty-five (25) East, Mount Diablo Base and Meridian, in the County of Mono, State of California.

IV.

That said land, to wit: said Section Sixteen (16), Township One (1) North, Range Twenty-five (25) East, Mount Diable Base and Meridian and the whole of said tract is necessary for the public use aforesaid, viz.: For the purpose of preserving and maintaining water rights, water sheds and sources, equipping, operating and maintaining canals, laterals, aqueducts, flumes, tunnels, ditches, pipes and pipe lines with all their appurtenances for supplying, selling and distributing water and power to mines, farming neighborhoods, precincts, cities, towns, villages and other municipal divisions, and to corporations or individuals, for drainage, reclamation and irrigating lands and of constructing, equipping, operating, and maintaining ditches, reservoirs, dams, tunnels, levees, viaducts, bridges, embankments, excavations and the sites therefor for the collection, storage, sale and distribution of water and for constructing, operating and maintaining pumps and pumping plants, electrical lighting and power plants, electric and power lines, oil pipe lines and all the necessary appurtenances thereto and for the generation and distribution of electric light and power to such places as said corporation, plaintiff, may think necessary or convenient for the purpose of its business by means of poles, wires, conduits, and sub-ways or otherwise over and through said section Sixteen and thence over and through other lands and water, or both, as the purposes of this corporation shall require.

V.

That none of said tract of land, to wit: said Section Sixteen (16), Township One (1) North, Range Twenty-five (25) East, Mount Diablo Base and Meridian, has heretofore been appropriated to any public use.

VI.

That the proper names of the said defendants, John Doe, Richard Roe and Peter Pink are unknown to plaintiff, and are, therefore, herein designated by fictitious names, and plaintiff prays that when their true names are discovered, they may be inserted by proper amendment to this complaint.

WHEREFORE, plaintiff prays that the Court will ascertain and assess the value of the property herein sought to be condemned; that said land be condemned to said proposed public use, to wit: for the public use of said plaintiff, and that plaintiff may have such other and further relief as may be meet in the premises.

A. H. RICKETTS,
Attorney for Plaintiff.

Duly verified and filed June 23, 1911.

"B"

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF MONO.

DESERET WATER, OIL & IRRIGATION COMPANY (a Corporation),

Plaintiff,

vs.

THE STATE OF CALIFORNIA, et al.,

Defendants.

} Judgment

This cause having come on for trial on the 20th day of September, 1911, before Hon. W. S. Wells, Superior Judge, and the issues therein arising upon the complaint of plaintiff and the answer of the defendant, the State of California, having been duly tried before the Court, sitting without a jury, and the Court having found and determined that the use and uses to which the tract of land hereinafter particularly described is to be applied for a public use and uses authorized by law, and the taking of said land is necessary to such use and uses,

NOW, THEREFORE, on motion of A. H. Ricketts, Esq., attorney for the plaintiff,

IT IS ORDERED, ADJUDGED AND DECREED that the plaintiff take and acquire and have for its own use in fee for the purpose of pre-

serving and maintaining water rights, water sheds and sources, equipping, operating and maintaining canals, laterals, aqueducts, flumes, tunnels, ditches, pipes and pipe lines with all their appurtenances for supplying, selling and distributing water power to mines, farming neighborhoods, precincts, cities, towns, villages and other municipal divisions and to corporations or individuals for drainage, reclamation and irrigating lands and of constructing, equipping, operating and maintaining ditches, reservoirs, dams, tunnels, levees, viaducts, bridges, embankments, excavations and the sites therefor, for the collection, storage, sale and distribution of water, and for constructing, operating and maintaining pumps and pumping plants, electric lighting and power plants, electric and power lines, oil pipe lines, and all the necessary appurtenances thereto, and for the generation and distribution of electric lights and power to such places as said corporation, plaintiff, may think necessary or convenient for the use of its business by means of poles, wires, conduits and subways or otherwise over, through and across the land hereinafter particularly described that certain tract of land situate, lying and being in the County of Mono, State of California and more particularly described as follows, to wit: Section Sixteen (16), Township One (1) North, Range Twenty-five (25) East, Mt. Diablo Meridian, containing Six hundred and forty (640) acres of land, and that the plaintiff pay as compensation and damages to the said defendant, the State of California, said State of Cali-

fornia being the owner and entitled thereto, the sum of Six hundred and forty (640.) dollars for said tract of land and the whole thereof, together with its costs taxed at $.....

Done this 10th day of January, 1912.

WM. S. WELLS,
Judge Presiding.

Filed January 15, 1912 and entered January 15, 1912, in Book "C" of Judgments at page 127.

In the Supreme Court of the United States.

THE STATE OF CALIFORNIA, *Plaintiff in Error,* v. DESERET WATER, OIL & IRRIGATION COMPANY, a corporation, *Defendant in Error.*	Term No. 269 (File No. 24,962) October Term 1916

ARGUMENT.

THE RECORD DISCLOSES NO FEDERAL ELEMENT.

The plaintiff in error herein seeks the interposition of this court upon the ground that a Federal question is involved herein although the record shows that it did not set up and claim in the State courts by any bill of exceptions (Trans. pp. 28-30-31-74-75, folios 61-65-68-160-162) or something which is equivalent, as belonging to it any right, title, privilege or immunity under the constitution of the United States, or any treaty, statute, commission or authority of the United States.

In *Cleveland etc. R. R.* v. *Cleveland,* 235 U. S. 50, the Court said:

> "In order to bring a case here under Section 237 of the Judicial Code (formerly Section 709 of the Revised Statutes of the United States), it is well settled that the federal right must have been set up and adjudicated against the claimant by the judgment of the State Court."
>
> "In order that this Court might see what was the right claimed by them, and whether it was denied to them by the decision of the State

Court."

Oxley Stave Co. v. *Butler Co.*, 166 U. S. 656.

The Supreme Court of the State was asked to do nothing more than construe State statutes existing at the time this action was brought. Consequently the judgment of that court discloses no federal element and no federal question was decided directly or by implication therein and the certificate of the presiding Justice of the State Supreme Court (Trans. p. 76, folio 164) made after the decision, to the effect that a federal question was considered and decided adversely to the plaintiff in error cannot in itself confer jurisdiction on this court.

Seaboard etc. R. R. v. *Duvall*, 225 U. S. 477;

Louisville etc. Co. v. *Smith etc. Co.*, 204 U. S. 551;

Fullerton v. *Texas*, 196 U. S. 192.

Waters-Pierce Oil Co. v. *Texas*, 212 U. S. 97.

This case was begun in the State Court of Texas to forfeit the permit of the plaintiff in error to conduct business in the State of Texas and to assess penalties against it for violation of the anti-trust laws of that State. The jury returned a verdict against the defendant. The judgment was affirmed upon appeal. The Supreme Court of Texas refused to grant a writ of error, and the case was brought to this Court and the writ of error was dismissed.

The Court said:

"The jurisdiction of this court to review the

proceedings of the state courts, as we have had frequent occasion to declare is not that of a general reviewing court in error, but is limited to the specific instances of denials of Federal rights, whether those pertaining to the constitutionality of Federal or state statutes, or to certain rights, immunities and privileges of Federal origin, specially set up in the state court and denied by the rulings and judgment of that court."

See also

Appleby v. *Buffalo,* 221 U. S. 524;
Capital Bk. v. *Cadiz Bk.,* 172 U. S. 425;
Murdock v. *Memphis,* 20 Wall. 635.

In *Kennard* v. *Nebraska,* 186 U. S. 304, it was contended that the plaintiff's right to recover was defeated solely by the construction that the State Court placed upon certain Congressional Acts, and that thus a Federal question appears in the record, giving this court power to review the decision of the State Court.

This court said:

"The decision by the Supreme Court of the State, that the Pawnee reservation lands in Nebraska were public lands within the meaning of the twelfth section of the Enabling Act, did not bring into question the validity of that section—much less was its decision *against* its validity. As, then, the plaintiff in error specially set up or claimed no federal right, and as the judgment of the Supreme Court of Nebraska did not impugn the validity of any statute of the United States, we find nothing on which to rest a right to review the judgment and the

writ of error is accordingly dismissed." (Italics ours.)

The case at bar involves the right of the defendant in error to condemn a surveyed section of school land, the property of the State of California, to wit: Section Sixteen, Township 1 North, Range 25 East, M. D. M. (Mt. Lyell Quadrangle, Trans. between pp. 22 and 23) situated within the exterior boundaries of the Mono Forest Reservation. This section has been identified by survey and the title thereto completely vested in the State of California before such reservation was created.

Heydenfeldt v. *Mining Co.*, 93 U. S. 634;
Cooper v. *Roberts*, 18 How. 173;
Hibberd v. *Slack*, 84 Fed. 751;
Slade v. *Butte Co.*, 14 Cal. A. 453.

This condemnation was sought for the purpose of preserving and maintaining water rights, water sheds and sources, equipping, operating and maintaining canals, laterals, aqueducts, flumes, tunnels, ditches, pipes and pipe lines with all their appurtenances; supplying, selling and distributing water and electric power to mines, farming neighborhoods, cities, towns, villages and other municipal divisions, and to corporations and individuals; draining, reclaiming and irrigating lands, and equipping, operating and maintaining ditches, reservoirs, dams, tunnels, levees, viaducts, bridges, excavations and sites for the collection, storage, sale and distribution of water; for the operation and maintenance of pumps

and pumping plants, electrical power, lines, wires, conduits and subways. These purposes are those for which the right of eminent domain may be exercised under the laws of the State of California.

Code of Civil Procedure, Sec. 1238.

The plaintiff in error herein, however, contended that said Section Sixteen being surrounded by land within a National Forest Reserve (i. e. a permanent reservation, Trans. p. 4, folio 7) was withdrawn from eminent domain proceedings by virtue of the provisions of Sec. 3408 b of the Political Code of the State of California. That Section reads, in part, as follows:

> " * * * All sixteenth and thirty-sixth sections, both surveyed and unsurveyed, which may now or may hereafter be included within the exterior boundaries of a national reservation, or of a reserve, or within the exterior boundaries of lands withdrawn from public entry, shall be and are hereby withheld from sale by the State, and the same shall hereafter be used only as bases for indemnity selections as in this article provided." * * *

Sec. 3408 b of the Political Code as to any attempted exclusive devotement of School Lands belonging to the State of California for use as bases for indemnity selections was repealed by the local act of May 1, 1911.

That act (Stats. 1911, p. 1408), so far as in point reads as follows:

> "Section 1. All sixteenths and thirty-sixth sections of school land belonging to the State of California and situated within the exterior

boundaries of a military, Indian or Forest Reservation, created by authority of the United States, or of a National Forest, national park, or national monument, or within the exterior boundaries of lands withdrawn from public entry for forest purposes, are hereby withdrawn from sale by the State of California.

* * * * *

Sec. 3. Nothing in this Act contained shall be construed as preventing the use of said sixteenth and thirty-sixth sections as bases for indemnity selections, as provided by law, and likewise, nothing in this act contained shall be construed as a recognition that prior to the passage hereof the said sixteenth and thirty-sixth sections, in Section 1 hereof referred to, have not heretofore been withdrawn from sale by the State.

Sec. 4. All acts or parts of acts in conflict with this act are hereby repealed."

The acts of Congress authorizing any selection whatsoever as to School Lands granted to the State are Revised Statutes of the United States Secs. 2275 and 2276, as amended by Act of February 28, 1891.

Said Sections of said Revised Statutes, as amended in 1891, are as follows:

"Sec. 2275. Where settlements with a view to pre-emption or homestead have been, or shall hereafter be made, before the survey of the lands in the field, which are found to have been made on Sections Sixteen or Thirty-six, those sections shall be subject to the claims of such settlers; and if such sections, or either of them, have been or shall be granted, reserved, or pledged for the use of schools or colleges in the State or territory in which they lie, other lands

of equal acreage are hereby appropriated and granted, and may be selected by said State or territory, in lieu of such as may be thus taken by pre-emption of homestead settlers. And other lands of equal acreage are also hereby appropriated and granted, and may be selected by said State or territory where sections sixteen or thirty-six are mineral lands, or are included within any Indian, military, or other reservation, or are otherwise disposed of by the United States; provided, where any State is entitled to said sections sixteen and thirty-six, or where said sections are reserved to any territory, notwithstanding the same may be mineral land or embraced within a military, Indian, or other reservation, the selection of such land in lieu thereof by said State or territory shall be a waiver of its right to said section. And other lands of equal acreage are also hereby appropriated and granted, and may be selected by said State or territory to compensate deficiency for school purposes, where sections sixteen or thirty-six are fractional in quantity, or where one or both are wanting by a reason of the township being fractional, or from any natural cause whatever. And it shall be the duty of the Secretary of the Interior without awaiting the extension of the public territory, to ascertain and determine, by protraction or otherwise, the number of townships that will be included within such Indian, military, or other reservations, and thereupon the State or territory shall be entitled to select indemnity lands to the extent of two sections for each of said townships, in lieu of sections sixteen and thirty-six therein; but such selections may not be made within the boundaries of said reservation; provided, however, that nothing herein contained shall prevent any State or territory from awaiting the

extinguishment of any such military, Indian, or other reservation and the restoration of the lands therein embraced to the public domain and then taking the sections sixteen or thirty-six in place therein; but nothing in this proviso shall be construed as conferring any right not now existing.

Sec. 2276. That the lands appropriated by the preceding section shall be selected from any unappropriated, surveyed public lands not mineral in character, within the State or territory where such losses or deficiencies of school sections occur; and where the selections are to compensate for deficiencies of school land in fractional townships, such selections shall be made in accordance with the following principles of adjustment, to-wit: For each township, or fractional township, containing a greater quantity of land than three-quarters of an entire township, one section; for a fractional township, containing a greater quantity of land than one-half, and not more than three quarters of a township, three-quarters of a section; for a fractional township, containing a greater quantity of land than one-quarter, and not more than one-half of a township, one-half section; and for a fractional township, containing a greater quantity of land than one entire section and not more than one-quarter of a township, one quarter section of land; provided, that the States or territories which are, or shall be entitled to both the sixteenth and thirty-sixth sections in place, shall have the right to select double the amounts named, to compensate for deficiencies of school lands in fractional townships."

The foregoing sections of the Revised Statutes of the United States were first called to the attention of the State Supreme Court in the petition by the

defendant in error herein for a hearing of this case in that Court (Trans. p. 40, folios 93-96). The purpose being to show to that court, not that a federal question was involved in the case at bar but that no provision had been made by Congress for the exchange of lands between the United States and the State in cases in which the title to lands had passed from the United States to the State, and, consequently, that such lands could not be made the bases for indemnity selections as provided by the aforesaid state law.

In this connection that Court held that:

> "(5). The conclusion upon this branch of the consideration therefore, necessarily must be that while the State of California has by appropriate legislation offered to exchange such lands for other lands of the United States, there is *no law of the United States* authorizing such exchange, and *no act of the Congress* taken in contemplation of any such exchange, present or future. Therefore the position of our State law (Act of 1911) that these sections may be used as 'bases for indemnity selections provided by law' is without present efficacy by reason of the fact that there is no law of the United States either authorizing indemnity selections in such cases or authorizing an exchange of such lands in any other way." (Italics ours.) (Trans. p. 56.)

The mere fact that a State statute is admittedly addressed to a certain act of Congress relating to an exchange of lands cannot make the determination of a right claimed under a State statute a federal question.

Erie R. Co. v. *Solomon,* 237 U. S. 427;
Kennard v. *Nebraska,* 186 U. S. 304;
Miller's Ex. v. *Swann,* 150 U. S. 132, 137.

and the expression of the view of the State Court in determining the effect of a State statute is not a decision against a right set up under any authority exercised under the United States, nor against the validity of such an authority.

Cook Co. v. *Calumet etc. Co.,* 138 U. S. 635, 654.

The construction given to a statute of a State by the highest tribunal of such State is regarded as a part of the statute, and is as binding upon the courts of the United States as the text.

Leffingwell v. *Warren,* 2 Black, 599;
Randall v. *Brigham,* 7 Wall. 523;
Murray v. *Gibson,* 15 How. 421.

Furthermore, as appears herein, the Supreme Court of California decided this case on a ground broad enough to maintain its judgment without considering any Federal question.

O'Neil v. *Vermont,* 144 U. S. 323,

and this court has no jurisdiction to review that decision under Sec. 237 Judicial Code.

Mellon v. *McCafferty,* 239 U. S. 134;
Wadley S. Ry. v. *Georgia,* 235 U. S. 651;
Mead v. *Portland,* 200 U. S. 148;
Bacon v. *Texas,* 163 U. S. 207;
Turner v. *Wilkes,* 73 U. S. 461.

It clearly appears from the whole record that no provision of the Constitution of the United States, or Act of Congress was relied on by the plaintiff in error herein or that any federal right was claimed by the State or that such right was denied to it.

It is respectfully submitted that this Court has no jurisdiction to pass upon the question presented herein for the reason that it nowhere appears in the record that the plaintiff in error at any time specially set up or claimed in the State Court as belonging to it some title, right, privilege or immunity under the Constitution of the United States, or some treaty, statute, commission or authority of the United States. That all the matters put in issue by the complaint and answer herein and decided by the State Courts were questions which depended for their decision upon the construction of State Statutes and without reference to the construction or effect of any of the provisions in the Constitution, or any Act of Congress. That this writ of error should, therefore, be dismissed for want of jurisdiction, or the judgment of the State Court should be affirmed.

A. H. RICKETTS,

Attorney and Counsel for Defendant in Error.

Synopsis.

Table of Cases and Authorities Cited.

No. 24,962

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1916

No. 269

THE STATE OF CALIFORNIA,
Plaintiff in Error,
vs.
DESERET WATER, OIL AND IRRIGATION COMPANY (a corporation),
Defendant in Error.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

I.

THE QUESTION OF JURISDICTION.

Defendant in error contends that this court has no jurisdiction in this matter because "the judgment of the state supreme court discloses no federal element and no federal question was decided directly or by implication therein" (Brief of Defendant in Error, p. 4). The California court held that the federal question was sufficiently raised to enable it to hold

against the state, though the court said that if the state's position as to the authority of the federal officers was correct, the state should have had judgment. It is true that some purely state questions were raised and determined by the court, but the main question involved in the opinion of the court was the question of the authority of the United States land office, under sections 2275 and 2276, to carry out the plan of exchange agreed upon by the state and such officers, and acted upon by them for the past twenty years. The California court expressly held that the state had done all that it could do under the circumstances and that its laws were sufficient in every respect, and that the only hitch in the proceedings was found in the interpretation to be given to sections 2275 and 2276 of the Revised Statutes of the United States. If the court had accepted the interpretation of these sections given by the land department and the state, then there would have been an end to the controversy, because, in that event, the listing by the land department would have been recognized and the equitable title of the United States in the lands involved would have required a reversal of the judgment.

The court did not hold against the state on account of any want of authority to be found in the state statutes, but solely on account of the want of authority in the federal officers claimed under the acts of Congress.

Deseret etc. Co. v. California, 167 Cal. 147; (Transcript, p. 55, folio 123).

The court having treated the federal question as being properly before it, and having decided adversely to the

state upon the basis of its interpretation of such federal question, the case clearly comes under the rule of

Rogers v. Hennepin Co., 240 U. S. 184-188.

II.

THE QUESTION OF PLEADING.

Defendant in error endeavors to sustain its position by technical objections to the pleadings which are now being raised for the first time. It contends that by reason of the failure of the state to deny, in its answer, ownership, and the allegation that the property was not devoted to another public use, those matters are now admitted. These points have never before been raised, and cannot be raised at this time, inasmuch as they are purely matters of state pleading, which, under the rules and decisions of the state courts, must be raised at the original hearing. Furthermore, the allegation in the complaint that the property was not appropriated to some other use, is an allegation of a conclusion of law which is not admitted by failure to deny under any circumstances. Whether property is devoted to a public use, and whether the use to which property is sought to be devoted is a public one, has always been treated as a question of law rather than fact under California practice.

Lux v. Haggin, 69 Cal. 255, 301, 306.

The uniform practice under the California statutes has been that in eminent domain proceedings it is necessary for the plaintiff to prove its case and this

is so even if defendant fails to answer altogether. Plaintiff cannot take judgment by default in condemnation. When the state is sued it is not required to verify its pleadings, and, therefore, specific denials of allegations of the complaint are not necessary (section 446, California Code of Civil Procedure).

Section 1248 of the California Code of Civil Procedure reads, in part, as follows:

> "The court, jury, or referee must hear such legal testimony as may be offered by any of the parties to the proceedings, and thereupon must ascertain and assess:
>
> 1. The value of the property sought to be condemned, and all improvements thereon pertaining to the realty and of each and every separate estate or interest therein."

Section 1241 of the same code provides, in part, as follows:

> "Before property can be taken, it must appear:
>
> 1. That the use to which it is to be applied is a use authorized by law;
>
> 2. That the taking is necessary to such use * * *;
>
> 3. If already appropriated to some public use, that the public use to which it is to be applied is a more necessary public use * * *."

There can be no doubt that under these sections the trial court must ascertain the rights of all parties and must determine whether the property is devoted to some other public use before it may issue its order of condemnation, and it is not relieved of the necessity of so finding by any admissions in the answer, or, in fact,

by a total failure on the part of the defendant to answer at all.

III.

THE QUESTION OF THE POWER OF EXCHANGE.

Coming to the merits of the controversy, the defendant in error rests solely upon the decision of the federal courts in

Hibbard v. Slack, 84 Fed. 571;
Johnston v. Morris, 72 Fed. 890.

The state relies upon the unbroken rulings of the federal land department, commencing with the decision of Acting Secretary Ryan dated January 30, 1899 (28 Land Dec., p. 57), wherein it was expressly held that under sections 2275 and 2276 the department had power to effect the exchange of school sections which were surveyed prior to the establishment of a national reservation. In that decision the former rulings of the department dated December 27, 1894 (19 Land Dec., p. 585), were recalled and vacated. This decision has been followed and approved by the land department without exception, and has never been modified or reversed by that department.

See

In re Territory of New Mexico, 29 Land Dec., 364;
Dunn v. State of California, 30 Land Dec., 608;
In re State of California, 33 Land Dec., 356;
In re State of California, 34 Land Dec., 613.

These rulings of the department do not establish a new principle in regard to the control of public lands. The power of the United States to accept school sections which had been granted to a state, the title to which had passed to the state upon survey, was expressly recognized by this court in

Durand v. Martin, 120 U. S. 366-374,

where the court said:

> "If the state was actually entitled to indemnity, it was got, and the United States only gave what it had agreed to give. If the state claimed and got indemnity when it ought to have taken the original school sections, the United States took the school sections and relinquished their rights to the lands which had been selected in lieu."

Power was also recognized by the Congress in the Act of March 1, 1877 (19 Statutes at Large, 267), where permission was expressly given to the state of California to make indemnity selections in lieu of school sections believed to have been within a Mexican grant.

It will be noted that a controversy as to the power of the federal officers to act in this regard has not been raised by either the United States or the state, but between these parties the question of power has been treated as settled by the rulings of the land department, and both parties have acted in accordance with such rulings for the past twenty years. It is respectfully submitted that this question of power cannot be raised by a private person or corporation, but that it is one which may arise between the United States and its agents alone. This court has said:

> "The executive, as agent, was in charge of the public domain; by a multitude of orders extending over a long period of time and affecting vast bodies of land, in many states and territories, he withdrew large areas in the public interest. These orders were known to Congress, as principal, and in not a single instance was the act of the agent disapproved. Its acquiescence all the more readily operated as an implied grant of power in view of the fact that its exercise was not only useful to the public but did not interfere with any vested right of the citizen."
>
> *U. S. v. Midwest Oil Co.*, 236 U. S. 459-475.

This rule is particularly applicable here. It cannot be claimed that the rulings of the land department have not been known to Congress, and, inasmuch as Congress has acquiesced in the action of the department, it has impliedly granted to the department the power to so act, if such power has not been expressly granted in the acts of Congress above noted.

In eminent domain proceedings corporations or individuals seeking to exercise the right do so as agents of the state only.

> *California Central Railway Co. v. Hooper*, 76 Cal. 404-407.

Thus, the state of California, having on its own initiative recognized the power of the United States land department to effect transfers of surveyed school sections, and having expressly provided that such surveyed school sections when included within a national reservation should be used as bases for indemnity selections only, and having provided the method by which title to such sections could be transferred to the United

States, and having used the section here in controversy as an indemniity base and made a valid offer to the United States to transfer the same, such offer cannot be defeated by the action of one of its agents.

The foregoing views are supported by the decision of the California supreme court in all respects excepting as to the power of an agent to revoke the offer of its principal. The California court rejected the claim of the state that by the withdrawal from sale of these school sections the right to condemn the same was denied, but this ruling was based not upon any interpretation of the statutes of California, but was based upon the construction of the federal statutes, which, it was held, rendered the state statutes ineffective *until express authority to act was given to the federal officers by Congress.* It was upon the same basis that the California court held that these lands were not devoted to a public use, because, unquestionably, any use to which the state devotes its property is a public use because the state has no private purposes, and if the state had the power to use surveyed sections as bases for indemnity purposes, then, necessarily, such use was a public use. The only theory upon which the holding of the California court as to the public use is based, is that the state was without power to devote these surveyed sections to the use intended because of the federal statutes.

Furthermore, it is respectfully submitted, that, as frequently pointed out in this proceeding, and not denied, these surveyed sections have been used by the state of California as bases for the past twenty years, and

hundreds of thousands of acres of land have been disposed of to individual settlers using such sections as bases. If the decision of the California court is allowed to stand the title of the state to its bases, as well as the title of the individuals to the lieu lands, is put in jeopardy and clouded, the result of which will be untold litigation and confusion. Rights have been built up on the faith of the rulings of the land department and the statutes of California, and the acts of the state thereunder, patents have been issued by the state to individual settlers on the basis of such rulings and such statutes, and it would be a manifest injustice to hold at this time that all of such proceedings have been illegal and that such settlers have not secured legal title to their holdings. It is conceded here that over three hundred thousand acres of land in the state of California alone are now tied up awaiting a reversal of the decision of the California court in this case, but this refers only to pending applications and does not include those applications which have been granted by the federal officers on the strength of the rulings of the land department, which, we respectfully submit, have been acquiesced in and concurred in by Congress through its failure to take any action to the contrary.

In view of these considerations we respectfully submit that the conditions are such as were considered by this court in

United States v. Midwest Oil Co., 236 U. S. 459-473, and

Butte City Water Co. v. Baker, 196 U. S. 127.

The duties of the executive in regard to the disposition of public lands having been conferred upon the Department of the Interior, and the determination of the power of the United States to accept these surveyed sections as bases being judicial in its nature, such rulings of the department are final conclusions and Congress alone can deny the right of the department to so act.

Humbird v. Avery, 195 U. S. 480-507;
Louisiana v. McAdoo, 234 U. S. 627-633;
Riverside Oil Co. v. Hitchcock, 190 U. S. 316-325.

Dated, San Francisco,
January 16, 1917.

Respectfully submitted,

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TABLE OF CASES REFERRED TO IN THE BRIEF OF DEFENDANT IN ERROR

SYNOPSIS.

In the Supreme Court of the United States

THE STATE OF CALIFORNIA,
Plaintiff in Error,

v.

DESERET WATER, OIL & IRRIGATION COMPANY, (a corporation),
Defendant in Error.

No. 24,962
October Term, 1916
No. 269

BRIEF FOR DEFENDANT IN ERROR.

I.

NO FEDERAL QUESTION IS INVOLVED.

This is an action to condemn a certain section 16, the property of the State of California, under the School Land Grant. The lands involved herein were identified by survey before the creation of the Mono Forest Reserve. The State's ownership of these lands is admitted in the pleadings. The State Courts determined this cause without deciding or being called upon to decide a federal question.

The main contention of the plaintiff in error in the State courts was, that the land sought to be condemned was not subject to the exercise of the right of eminent domain, because such lands were surveyed lands and are wholly situate within the exterior boundaries of a permanent reservation; that by their inclusion within such boundaries they were devoted to a public use by the State as bases or indemnity selections and to a public use by the United States because of being within the confines of a Forest Reserve, although it was admitted in the amended answer, by failure to deny the allegation in the complaint which set forth that they were not appropriated to any public use.

The record does not disclose that any federal question was raised in the State courts by the plaintiff in error, on the contrary, it asserts (Brief, p. 10), that "The provisions of the State law were deemed sufficient and controlling by both parties" and that the provisions of Sections 2275 and 2276 of the United States Revised Statutes were called to the attention of the said Supreme Court by the defendant in error herein in its petition for a hearing in that Court after the decision of the Court of Appeal. (See also Brief, p. 14.)

The defendant in error herein deemed it incumbent to present the effect of said sections to the State Supreme Court because the said District Court of Appeals, *sua sponte,* declared, in its opinion herein that:

"We think it apparent that the United States

is a necessary party to the final determination of the controversy and should be joined in the litigation. As we have seen, the State has done all it could to divest title to the land, at least to 600 acres of it, has sold its scrip and the lieu selection has actually been made and approved by the land office, and the only thing remaining to vest complete title in the United States is the affirmance of the general land office of the action of the local department. Under these circumstances it is manifestly a matter of grave concern to the United States whether this land is still available as the basis of an indemnity selection. It has a direct interest in that question and so has the plaintiff (defendant in error) in the consideration of whether the general land office will approve or has approved of the selection. Indeed it may be that before judgment was rendered for plaintiff the title to the land vested in the United States by virtue of the approval of said selection." * * * (Trans. p. 50, folios 117 and 118.)

This is contrary to the admitted fact in the pleadings that the plaintiff in error is the owner of the lands involved herein.

Allegations in the complaint not controverted in the action, must for the purpose of the action, be taken as true,

Crandall v. *Parks,* 152 Cal. 772;

See, also, *Robertson* v. *Perkins,* 129 U. S. 235,

and they become admitted facts in the case.

Merguire v. *O'Donnell,* 103 Cal. 50.

Although no issue was set up nor claimed under said sections by the plaintiff in error in said Court

it now asserts that the construction the State Supreme Court gave to these sections presents a federal question and gives this Court power to review that decision.

The finding of the State Supreme Court that these sections were not applicable to the question in the case at bar did not bring into question the validity of these sections nor was such decision *against* their validity.

See *Kennard* v. *Nebraska*, 186 U. S. 304.

The judgment of the State Supreme Court discloses no federal element and no federal question was decided directly or by implication therein. The Court held that there *was no law of the United States* authorizing an exchange of lands by the State with the United States and that a *State statute* seeking such exchange was therefore without present efficacy. In other words, the right claimed in the State Court by the plaintiff in error was a right claimed under the State statute and not one arising under any existing statute of the United States and no right was set up by the plaintiff in error under any authority exercised under the United States or against the validity of such an authority, and, therefore, this Court has no jurisdiction to review that decision under Section 237 Judicial Code.

Olympia Mg. Co. v. *Kerns*, 236 U. S. 211;
Waters-Pierce Oil Co. v. *Texas*, 212 U. S. 97.

It is well settled that the federal right must have been set up and adjudicated against the claimant by the judgment of the State Court.

Cleveland & Pittsburgh R. R. Co. v. *Cleveland,* 235 U. S. 50.

The plaintiff in error, however, asserts in its brief that as the lands in controversy have been used as bases for indemnity selections under the State law (Brief p. 2); that as the selection of such land as such bases had been accepted by the local United States Land Offices (Brief p. 3), and as the State Supreme Court held "that in so far as these surveyed sections were concerned, the State laws were ineffective because of the want of power in the federal authorities to act in that connection on behalf of the federal Government," there was, therefore, clearly drawn in issue in the State court the question of "an authority exercised under the United States" and there was also drawn in question a "title, right, privilege, * * * claimed under * * * a Statute of * * * or authority exercised under the United States," and the decision was against the claim so set up and against the validity of the "authority exercised under the statutes of the United States." (Brief p. 4.)

We respectfully submit that the action of the local Land Offices in accepting the selection by the State as bases for indemnity was an usurpation of power which cannot constitute an authority exercised under the United States or be adequate to create a federal question.

In its opinion herein the State Supreme Court said:

> "The land is a sixteenth section, title to which passed to the State by virtue of the federal School Land Grant. It is a surveyed section, title to which is completely vested in the State.
>
> *Heydenfeldt* v. *Mining Co.*, 93 U. S. 634, (Cited with approval in *Minnesota* v. *Hitchcock*, 185 U. S. 375; *U. S.* v. *Morrison*, 240 U. S. 207);
>
> *Cooper* v. *Roberts*, 18 Howard 173;
> *Hibberd* v. *Slack*, 84 Fed. 571, (Cited approvingly in *U. S.* v. *Cowlishaw*, 202 Fed. 321);
> *Slade* v. *Butte Co.*, 112 Pac. 485.
>
> "After this complete vestiture of title in the state a national forest reservation was created which within its exterior boundaries included this section 16, in the County of Mono. The situation thus disclosed is, that complete title to the land having vested in the State of California before creation of the forest reserve, that title was in no way affected or impaired by the act of the federal authorities in creating this reserve any more than would their act affect the rights of any other private proprietor owning land within the delimited boundaries of the reservation. *Curtin* v. *Benson*, 32 Sup. Ct. Rep. 31."
>
> *Deseret etc. Co.* v. *California*, 167 Cal. 147.

In *U. S.* v. *Morrison*, 240 U. S. 207, this Court said that:

> "The rule which the Heydenfeldt Case established has, we understand, been uniformly followed in the land office. After reviewing the

> cases, Secretary Lamar concluded * * * that the school grant 'does not take effect until after survey, and if at that date the specific sections are in a condition to pass by the grant, the absolute fee to said sections immediately vests in the State, and if at that date said sections have been sold or disposed of the State takes indemnity therefor.' And see to the same effect *Niven* v. *California*, 6 L. D. 439; *Washington* v. *Kuhn*, 24 L. D. 12, 13; *California* v. *Wright*, Id. 54, 57; *S. Dak.* v. *Riley*, 34 L. D. 657, 660; *S. Dak.* v. *Thomas*, 34 L. D. 171, 173; *F. A. Hyde*, 37 L. D. 164, 166; *To Atty. Gen. of Mont.*, 37 L. D. 247, 250."

To the same effect, see,

Coban v. *Hyde*, 212 Fed. 480.

Lands embraced within the School Lands Grant (Act of Congress, March 5, 1853), have never been recognized by Congress as bases for any selection or receiving of lieu or other lands by the State except as bases for indemnity selections for loss of a portion of the Grant, i. e., where, through being mineral, subject to homestead entries, being unsurveyed and unidentified before creation of Forest Reserve, etc., it never vested in the State. Sections 2275 and 2276 of the Revised Statutes of the United States, as amended by Act of February 28, 1891, are the only Acts of Congress authorizing any selections whatsoever as to school land granted to the States. These sections are printed in full on pages 24, 25 of the argument of the defendant in error on motion to dismiss or to affirm this case. There can be no indemnity or other selection based upon school land, title to which vests

in the State. The only selections authorized by Congress are predicated upon a portion of the School Grant being lost to the State.

See *Hibberd* v. *Slack*, 84 Fed. 571, *post*.

There is nothing in the case of

Light v. *U. S.*, 220 U. S. 523,

contrary to the doctrine of the State Supreme Court, above cited, or which supports the contention of the plaintiff herein, that:

> "The State claimed that the creation of forest reserve thereby appropriated to public use all land situate therein under the control of the National Government, and this contention was supported by the decision of this Court."

The Light case was an appeal to review a decree enjoining the grazing of stock on a public forest reservation without a permit.

This Court said: That it was within the power of Congress to establish a forest reserve on the public domain without consent of the State where the land lies; that:

> "The government has, with respect to *its own lands*, the rights of an ordinary proprietor to maintain its possession * * *. It may deal with such lands precisely as a private individual may deal with his farming property * * * *. It is true that the United States do not and cannot hold property as a monarch may, for private or personal purposes * * *. All the public lands of the nation are held in trust for the people of the whole nation." (Italics ours.)

The Light case goes no further than to hold that:

> "The creation of a national forest reserve is, as to such laws as are under control of the Federal Government, a dedication and appropriation of this land to a public use. * * * The action of the United States cannot affect and is not designed to affect the lands so held" i. e. in private ownership.
>
> *Deseret etc. Co.* v. *California,* 167 Cal. 147.

Title to land in private ownership is not divested nor is such land confiscated to public use by the mere establishment of enclosing governmental lines.

Curtin v. *Benson,* 32 Sup. Ct. Rep. 31.

Lands in private ownership may be within the exterior boundaries of a governmental reserve and yet be no part thereof nor be in any way devoted to its use.

Wilcox v. *Jackson,* 13 Pet. 513;
Railroad Co. v. *Whitney,* 132 U. S. 357;
U. S. v. *Hemmer,* 241 U. S. 379.

In *Goar etc. Co.* v. *Shannon,* 223 U. S. 468, it is said that:

> "For, as we have repeatedly stated, when a state court has decided against the plaintiff in error on a matter of general law broad enough to sustain the judgment, this Court will not consider the Federal questions even though they have been actually considered and determined adversely to his contention. *Hale* v. *Akers,* 132 U. S. 454, 564."

To the same effect, see,

Mellon v. *McCafferty,* 239 U. S. 134;
S. P. R. Co. v. *Schuyler,* 227 U. S. 611;
Leathe v. *Thomas,* 207 U. S. 93;
Allen v. *Aguimban,* 198 U. S. 149;
Giles v. *Teasley,* 193 U. S. 146;
Bacon v. *Texas,* 163 U. S. 207.

This action was brought under Section 1240 of the Code of Civil Procedure of the State of California, which provides that:

> "The private property which may be taken under this title (Eminent Domain) includes:
> "1. * * *
> "2. Lands belonging to this State * * * not appropriated to some public use."

It was alleged in the complaint, (Brief p. 3, Folio 5), and it was not denied in the amended answer, (Trans. p. 4, Folios 7 and 8), and it was found as a fact by the trial court (Trans. p. 7, Folio 14) that none of said tract has heretofore been appropriated to any public use.

The allegation in the complaint that the land had not "heretofore been appropriated to any public use" was a material allegation, as Section 1240 of the Code of Civil Procedure provides that lands belonging to the State of California, "not appropriated to some public use shall be subject to eminent domain" If that allegation had been denied in its amended answer by the plaintiff in error, it would have been incumbent upon the trial of this cause for the defendant in error to prove that the public use to which the land was sought to be applied by

defendant in error was a more necessary public use than that to which it had (if at all), been already appropriated.

Code of Civil Procedure, Sec. 1241, Sub. 3.

Failing which the right to exercise eminent domain would have been denied. But, under the issues made by the pleadings, it was not necessary to show that the new use was superior to the use which the plaintiff in error now asserts it had already been appropriated. Hence, the question before the State court was purely a State question as to the operation of the law of eminent domain upon property situated within the State.

The failure to deny this allegation in the complaint was not cured, as the plaintiff in error asserts by alleging in its amended answer the existence of the forest reservation and the inclusion of the lands in controversy within it. (Brief p. 8.) The State's position therefore, obviously, is untenable, as the lands involved were not shown to have been appropriated to a public use by reason of being within a forest reservation.

The ownership by the State of the lands sought to be condemned being a fact admitted by the pleadings there can be no presumption against the ascertainment and established fact of such ownership.

Nieto v. *Carpenter,* 21 Cal. 455.

When it is shown that certain property belongs to a particular person, the law presumes that the ownership remains unchanged until the contrary

appears.

Kidder. v. *Stevens,* 60 Cal. 414;
Hoenshell v. *So. Riverside etc. Co.,* 128 Cal. 627.

It follows that when a particular status exists the law will presume its continuance and when it has been changed some evidence of that change must be produced.

Statutory divestiture of title does not depend upon presumption if it has been divested and as the admission of ownership by the State was not changed by evidence or otherwise, but was admitted, the fact of ownership in the State was indisputable as to the case at bar.

In any event the State Supreme Court said that:

> "A further argument upon the general subject is that the State has withdrawn such sections (16 and 36) from sale and that therefore the right of eminent domain may not be exercised regarding them. This, however, cannot be, in contemplation of the general law touching the right of eminent domain. Our statutes do not say that State lands reserved from sale, or State lands not offered for sale shall not be subject to the right of eminent domain. They declare that all the lands of the State shall be subject to this right, saving such lands alone as are devoted to a public use. The State might today have no laws for the sale of its proprietary lands. But this would not affect the power to exercise the right of eminent domain as accorded by the statutes of the State. The question of sale or non-sale imparts a foreign element into the discussion. *The sole de-*

fense in this respect which may be made by the State, conceding that it owns the land in controversy is that the land has been appropriated to a public use. That this land was not so appropriated we have discussed at length. In addition to that, the concessions of the pleadings declare that no part of it is so devoted." (Trans. pp. 56, 57, folio 125.) (Italics ours.)

It thus clearly appears that the State Supreme Court rejected the contention of the plaintiff in error that the lands involved were appropriated to a public use and the expression of the view of that court in determining the effect of the State law affecting the exercise of the right of eminent domain is not a decision against a right set up under any authority exercised under the United States, nor against the validity of such an authority,

Cook Co. v. *Calumet etc. Co.,* 138 U. S. 654,

but, even if the contrary were true this case was decided on a ground broad enough to maintain the judgment herein without considering any federal question.

O'Neil v. *Vermont,* 144 U. S. 323;

Goar etc. Co. v. *Shannon,* 223 U. S. 468, and cases cited, *ante,* in connection therewith.

II.

THESE LANDS WERE NOT APPROPRIATED TO THE PUBLIC USE OF THE STATE OF CALIFORNIA.

The plaintiff in error contends that "these lands were appropriated to the public use of the State of

California." (Brief p. 17.) The plaintiff in error bases this contention upon the fact that

> "The lands involved in this controversy are situated within the confines of the Mono Forest Reservation," and that "all of the section had been withdrawn from sale and reserved by the State for indemnity bases long prior to the institution of this action."
>
> "By this withdrawal the State had decreed that these school sections should be devoted solely to the one public use and purpose, to-wit: as bases for indemnity selections. Immediately upon the withdrawal they came within the excepted class mentioned in the eminent domain statute and were no longer subject to condemnation." (Brief p. 18.)

The effect of this contention is to attempt to invoke herein a construction of the general law of the State decided against the plaintiff in error, and is not a question which will be entertained by this Court.

The construction given to a statute of a State by the highest tribunal of such State is regarded as a part of the statute, and is as binding upon the courts of the United States as the text.

Leffingwell v. *Warren,* 2 Black 599;
Randall v. *Brigham,* 7 Wall. 523;
Murray v. *Gibson,* 15 How. 421.

III.

THESE LANDS HAD NOT BEEN WITHDRAWN FROM EMINENT DOMAIN PROCEEDINGS.

The plaintiff in error contends that

> "When the California Legislature withdrew these sections from sale and declared that they should be used as bases for indemnity selections only it thereby not only dedicated these lands to the public use but withdrew them from the operation of the eminent domain provisions of the statute." (Brief p. 19.)

This, again, merely presents a question of State law which has been decided adversely to the plaintiff in error and, therefore, will not be entertained by this Court under the authorities hereinbefore cited.

IV.

PROPERTY IN CONTROVERSY HAS NOT BEEN DEVOTED TO PUBLIC USE OF THE UNITED STATES.

The plaintiff in error contends that:

> "These lands have been devoted to the public use of the United States and in connection with the federal forest reservation." "That a national forest reserve is a public use, and that the property situate therein is devoted to a public use, seems too clear for argument." (Brief, p. 20.)

This is conceded when limited to property situate therein, which is not held in private ownership. But it is denied that "the property * * * of the

State becomes devoted to the public uses of a forest reserve immediately upon the establishment of the lines of a reservation." (Brief p. 20.)

Neither the case of *Light* v. *U. S.*, 220 U. S. 523, nor any other case holds that the national government can deprive a private owner of essential rights of ownership in his property by merely including it within the boundaries of a forest or any other national reserve.

Curtin v. *Benson*, 32 Sup. Ct., Rep. 31.

State lands are classified with lands held by individuals as "private property."

> "If in fact then this land has by the State been devoted to a public use, it cannot be from the mere fact of the federal authorities in creating the reservation, but must be found in some affirmative action by the State itself which alone has title to, and control over this section."
>
> *Deseret, etc. Co.* v. *California*, 167 Cal., 147.

In its argument before the State Supreme Court the plaintiff in error asserted that "The present status of these lands is that the State has offered them to the United States in exchange for other equivalent public lands belonging to the general government."

Deseret, etc. Co. v. *California*, 167 Cal. 147.

The State Supreme Court said that:

> "But while one party may offer to contract, the assent of the other party to the offer must in some way be evidenced before any rights, legal or equitable, can spring into existence."

And the State Court held that there was "no law of the United States authorizing such an exchange and no Act of the Congress of the United States taken in contemplation of any such exchange, present or future." "And this land was not so appropriated (to a public use)."

V.

THE PROPOSED EXCHANGE COULD NOT BE LEGAL WITHOUT FURTHER LEGISLATION.

The plaintiff in error contends that:

> "The main question involved here, and the real basis of the decision of the California Court, is the power and authority of the officials of the federal land office to accept the offer of the State and transfer to the State other lands in lieu of those in controversy" (Brief p. 21).

To sustain this contention it cites numerous rulings of the department of the interior, which rulings have permitted such exchanges, contrary to the decisions of Federal and State Courts, viz.:

Hibberd v. *Slack,* 84 Fed. 571;
Slade v. *Butte Co.,* 14 Cal. App. 453;
Johnson v. *Morris,* 72 Fed. 890.

The case of *Hibberd* v. *Slack,* 84 Fed., 571, is directly in point as to every phase of this question: and is directly in point as it concerns school lands surveyed prior to being surrounded by Forest Reserve.

The Court in that case states the question to be adjudicated as follows:

> "These pleadings raise the following question of law, to-wit: Is the State of California entitled to select other lands, in lieu of the sixteenth and thirty-sixth sections of school lands, situated within the exterior boundaries of a public reservation, where said sections were surveyed and became the property of the State, prior to the date when the reservation was created?"

In determining this query, unqualifiedly in the negative, the Court says:

> "Plaintiff contends that said Act of February 28, 1891, so far as concerns the appropriation to and selection by a State of lands of equal acreage, in lieu of Sections 16 and 36, included within a reservation, provides for two things: First, indemnity to said State for such of said sections as, before their surveys in the field, are included within a reservation, and thereby lost to the State; second, a plan by which the State may transfer or relinquish Sections 16 and 36, after its ownership has become absolute by surveys in the field, to the United States, and obtain therefor other lands of equal acreage, where, subsequent to such surveys, a reservation has been created, whose exterior boundaries include said sections; this plan being, not a grant of lieu lands to compensate losses in school sections, but an exchange between the Federal and State Governments of lands which belong, respectively to each. Defendant concedes the indemnity feature, as I have above distinguished it, of the Acts, but denies that said Act gives to the State the right to select lands of equal acreage with the school sections, where

the latter are included within the exterior boundaries of a reservation, subsequent to their survey in the field; that is, denies that the Act provides for any exchange of lands between the Federal and State Governments. In a decision dated December 27, 1894, the then Secretary of the Interior, Hon. Hoke Smith, decided the precise question here involved adversely to plaintiff's contention. In re, California, 19 Land Dec. Dept. Int., 585. Principles, however, contrary to those upon which that decision was based have been subsequently applied, by the present Secretary of the Interior, in a decision bearing date January 8, 1897.

"My opinion, after a careful consideration of the subject, is that plaintiff's construction of the Act of February 28, 1891, so far as relates to an exchange of lands, can not be maintained, although the reasons which have led me to this conclusion are different from those on which Secretary Smith rested his decision.

"In construing the Act of February 28, 1891, there are certain well-established principles of law, applicable to school sections, which should be constantly borne in mind, as follows: First, Title to a school section, if unencumbered at date of survey, then vests absolutely in the State. *Cooper* vs. *Roberts,* 18 How., 173; *Heydenfeldt* vs. *Mining Co.,* 93 U. S., 634. And this is the principle recognized and acted upon by the Department of the Interior. *In re Colorado,* 6 Land Dec. Dept. Int., 412; *In re Virginia Lode,* 7 Land Dec. Dept. Int., 459; *In re Miner,* 9 Land Dec. Dept. Int., 408; *Pereira* vs. *Jacks,* 15 Land Dec. Dept. Int., 273. After title has thus vested, the section is not subject to any further legislation by Congress. Therefore the school sections which were the bases of the selections of the lands sued for in the case at bar,

although situated within the limits of forest reservations, are not parts of such reservations. *Wilcox* vs. *Jackson,* 13 Pet., 513; *Railroad Co.* vs. *Whitney,* 132 U. S., 357, 10 Sup. Ct., 112. Second, Until the surveys in the field of the school sections, to wit, 16 and 36, the United States has full power of disposition over them; and, by the exercise of this power, said sections may be lost to the State. Hence, and through various enactments of Congress, has arisen the law of indemnity, whose cardinal doctrine is compensation for loss. Thus, it has been said, 'the principle upon which indemnity is given to a State is for a loss. It is not given for that which the State has already received.' *Poisal* vs. *Fitzgerald,* 15 Land Dec. Dept. Int., 19.

"Plaintiff concedes, in his brief, that up to the Act of February 28, 1891, compensation for loss was the only theory on which a State could acquire other lands in lieu of school sections, but contends that said Act introduced a new arrangement—'a statutory expedient'—for an exchange of properties between the United States and a State, whereby the former could reacquire Sections 16 and 36 after they had vested in the State; such expedient being not only 'novel,' but 'contrary to the old maxim of indemnity law that indemnity is not allowed except for losses.' "

The Court proceeds at length to consider all contentions of plaintiff to the effect that an indemnity selection concerns not only loss to the State, but contemplates an actual exchange of land owned by the State for lands of the United States. All of such contentions are held to be without any support under said or any Act of Congress.

Similarly in *Slade* v. *Butte County,* 112 Pac., 485 (Court of Appeal, Third District, California), the Court says:

> "By Act February 26, 1859, c. 59, 11 Stat., 385, the United States appropriated other lands of like quantity in lieu of the sixteenth and thirty-sixth sections or fraction thereof, granted to a State, where loss to the State in which the lands lie, by reason of having previously been settled upon 'with a view to pre-emption.' Subsequent statutes made like provision where the loss was by reason of settlement with a view to homestead, or where the lands are mineral, or are included within an Indian, military, or other reservation, or are otherwise disposed of by the United States.' See Act Feb. 28, 1891, c. 384, 26 Stat. 793 (U. S. Comp. St. 1901, pp. 2275, 2276). The Act appropriates and grants lands in lieu of the sixteenth and thirty-sixth sections so lost to the State, and provides that other lands of equal acreage 'may be selected by said State or Territory in which they lie.' Obviously no title passed of these so-called lieu lands by virtue of the statute alone, i. e., it was not a grant in *praesenti,* as was the grant of the school lands (sixteenth and thirty-sixth sections, in place). The statute looked to possible losses to the State and provided that, when such losses were ascertained and locations or selections were made by the State, the Government would, if the land selected were unoccupied public land subject to such location, approve such selection, and so officially inform the State, and thereupon title would vest in it, and patent would issue by the State to the locator."

Similarly in *Johnson* v. *Morris,* 72 Fed., 890, the Court says:

"The Secretary held that California took her school grant under Section 6 of the Act of March 3, 1853, and Section 6 of the Act of July 23, 1866, and that the indemnity provision of Section 2275 of the Revised Statutes, as amended, was not applicable to selections made by the State in lieu of the swamp land lost from the school land grant, on the ground that it would be giving to the State an indemnity, for a class of lands already donated to the State; and that the principle upon which indemnity is given to the State is for a loss, and not for that which the State has already received. This is a clear and forcible statement of the reason why the State is not entitled to make indemnity selections for school lands which it had already received as swamp lands, but this reason does not apply to losses from the school grant by reason of Sections 16 and 36 being mineral lands."

As a matter of fact, from time to time, the officers of the Department of the Interior as a "legal expedient" and without any authority or power whatever have held that indemnity selections comprise not only compensation for loss but also an actual exchange of lands between the State and the United States. There is not under any Act of Congress or any single decision the slightest support under the law for this position. And it is in fact contrary to other rulings of the officers of the Department. It can be explained only as a manifestation of the "progressive" spirit shown by a certain class of officials who appear to be obsessed with the idea that under the banner of conservation they are justified in overriding the law of the land, and flaunting their disrespect in the face of judges.

The provisions of Section 3408*b* of the Political Code to the effect that all surveyed school sections belonging to the State within the exterior boundaries of a National Reservation shall be used only as bases for indemnity selections are not in terms absolute or unqualified.

They must be read in connection with the provisions of Section 3408*c* of the Political Code passed at the same time and in the same Act as follows:

> "* * * In determining the bases in lieu of which the State is entitled to indemnity, the Surveyor-General shall also include all sixteenth and thirty-sixth sections which were surveyed at the time of the withdrawal of such lands from public entry, or at any time thereafter; provided, however, that should the land department of the United States determine that such surveyed sections are improper or invalid bases, then the Surveyor-General shall not be required thereafter to consider or treat said surveyed sections as valid or any bases for indemnity selections." * * *

Here we have a provision qualifying the development of such lands for use as indemnity base. The terms of Section 3408*b* are expressly conditioned upon the happening of a contingency. The devotement of such surveyed sections to use as indemnity base are to have force and effect only in case the Land Department of the United States shall not determine that such surveyed sections are improper or invalid bases for indemnity selections. Obviously the determination of the Land Department on this question must be consistent with the power and

jurisdiction of the officials in that regard. The foregoing authorities show that it is beyond the power and jurisdiction of the Land Department to hold on this question in any way other than to determine that surveyed sections afterwards surrounded by Forest Reserve are not proper or any valid bases for indemnity selections. Which means that in the eye of the law the Land Department has so held, for the reason that it has no power or jurisdiction to hold otherwise. Therefore it is apparent that the contingency has arisen, upon the happening of which, by the terms of said sections of the Political Code, such surveyed sections surrounded by Forest Reserve are not to be used as base for indemnity selections, viz: Upon it being determined that under Congressional legislation and the power of the Land Department thereunder such sections are improper and invalid bases for indemnity. Accordingly the authorities above quoted, conclusively establishing the proposition that such surveyed sections are not proper bases for indemnity, do not contravene the terms of Section 3408*b* but simply show that such terms are by the very wording of the Code sections inapplicable to such lands because the event named in the above proviso as making the terms of such sections inapplicable to such surveyed lands has come about.

The case of *Weyerhaeuser* v. *Hoyt*, 219 U. S. 380, is cited by plaintiff in error (Brief p. 33), in support of the contention that the power of the Secretary of the Interior to approve lieu selections is

judicial. An examination of that case will disclose the fact that the decision under consideration was as to the selections made and involved no question of the existence of a grant of lieu lands for that purpose. The case holds merely that as to all questions between the selector and one asserting a claim of superior right to the land selected the decision of the Secretary must be said to be judicial and as of the time of the filing of the selection.

A very different question is presented here, namely as to the effect of a State statute which attempts to appropriate State lands for an exchange with the Government which is not authorized or allowed by the federal statutes. As to that the law is what it is, and willingness of departmental officers to violate its express provisions cannot make it what it is not. The question here is as to the effect of Section 3408b of the Political Code of California, as an "appropriation" under Subdivision 2, Section 1240 of the Code of Civil Procedure of that State, and the determination of the scope and extent of the federal lieu land grant alone can afford us the answer. As to that we have the federal statutes themselves and the authoritative announcements of Congress.

> "It is a novel proposition to say that the ruling of an executive department should stand superior on the construction of a federal statute to the solemn adjudication of a court charged with the express duty of announcing the meaning of a statute in a litigated controversy over that meaning. It certainly requires no citation of

authority to show that the construction so placed by a federal court upon a federal statute is superior to such departmental ruling. And equally certain is it that though the Interior Department may elect to ignore the decisions of the courts of the United States, it is still not within the power of such a department to give, to sell or exchange the public domain without authority from Congress. And if, as the federal courts have decided, Congress has not given the department such authority, the department's efforts and acts in the exchange of such lands, when brought before a judicial tribunal, will be declared null and void. The conclusion upon this branch of the consideration therefore necessarily must be that while the State of California has by appropriate legislation offered to exchange such lands for other lands of the United States, there is no law of the United States authorizing such exchange, and no act of the Congress of the United States taken contemplation of any such exchange, present or future. Therefore, the position of our State law (Act of 1911) that these sections may be used as 'bases for indemnity selections provided by law' is without any present efficacy by reason of the fact that there is no law of the United States authorizing indemnity selections in such cases, or authorizing an exchange of lands in any other way."

Deseret etc. Co. v. *California,* 167 Cal. 147.

VI.

EFFECT OF THE OFFER OF THE STATE OF CALIFORNIA TO TRANSFER.

The plaintiff in error asserts that:

> "The State having made the offer (to transfer) and not having revoked it, it is still effective and the title to the land vests in the federal government whenever the federal authorities make the listings of other lands in lieu of those covered by the offer." (Brief p. 34.)

Obviously the action of the land department on this question must be consistent with the power and jurisdiction of the officials in that regard. The authorities hereinbefore cited show that it is beyond the power and jurisdiction of the land department to hold on this question in any way other than to determine that surveyed sections afterwards surrounded by a forest reserve are not proper or any valid bases for indemnity selections. Which means that in the eye of the law the land department has so held, for the reason that it has no power or jurisdiction to hold otherwise.

> "It is therefore untenable to hold that an unauthorized acceptance by the United States Land Department of such listing by the State, with no further act upon the part of the United States, for the reasons already given, can operate to divert or even impair the title of the State."
>
> *Deseret etc. Co.* v. *California,* 167 Cal. 147.

VII.

THE EQUITABLE INTEREST TO THE LANDS HAS NOT PASSED TO THE UNITED STATES.

The plaintiff in error asserts that

> "The United States of America has acquired an equitable interest in these lands by reason of which it has become an interested and necessary party to the action." (Brief p. 34.)

Under the provisions of Section 1248 of the Code of Civil Procedure and cites the overruled opinion of the District Court of Appeal to sustain that position.

It was held by the State Supreme Court that the case disclosed no interest, legal or equitable, in the land in controversy and, that, if it had any such right, those rights would not be impaired by its non-appearance.

Deseret etc. Co. v. *California*, 167 Cal. 147.

In *San Joaquin etc. Co.* v. *Stevinson*, 44 Cal. Dec. 594, it was held that a proceeding in eminent domain is not a suit in equity to determine the title to the property involved, nor one in which a general adjudication of such title could be made. On the contrary that it is a special proceeding for a particular purpose, namely to condemn the defendant's right for the benefit of the plaintiff as the purveyor of a public use. In such a controversy, third persons have no right to become parties to the condemnation proceedings. Nor, says the court, in *Alpers* v. *Bliss*, 145 Cal. 570, has a court the right to interject outsiders into a controversy before it.

See, also:

Wardlow v. *Middleton,* 156 Cal. 505.

In *International etc. Co.* v. *Bruce,* 194 U. S. 606, this Court said that the United States could not be made a party to a suit although it had a right *in rem* to the property involved in the action.

The doctrine laid down in *Hibberd* v. *Slack,* 84 Fed. 571, *ante,* and decided in the decision of the State Supreme Court in the case at bar disposes of any claim that the federal government had any interest whatsoever in the lands involved herein.

VIII.

THE QUESTION OF THE VALIDITY OF THE FOREST RESERVE.

As the plaintiff in error asserts that this question was

> "Not within the issues, were not material to the determination of the cause and were not discussed or argued by either of the parties." (Brief p. 36.)

It would be supererogatory to do so here and also be an unwarranted trespass upon the time of this Court. It may, however, be proper to state that the Light case does not support the theory of the plaintiff in error that the inclusion of private property within the lines of a governmental reserve *ipso facto* devotes such property to the public use of the United States.

Curtin v. *Benson,* 32 Sup. Ct. Rep. 31.

It is respectfully submitted—

1. That no federal question is involved herein.

2. That title to school sections vest absolutely in the State upon survey.

3. Subsequent inclusion of such lands in Forest Reserve does not in any way affect the title of the State.

4. The State suffers no loss as to the School Grant lands by subsequent creation of surrounding Forest Reserve.

5. Indemnity selections are under the Revised Statutes of the United States and the authorities so hold and in the nature of things it must be that they be predicated solely upon loss to the State.

A. H. RICKETTS,

W. H. METSON,

Attorneys and Counsel for Defendant in Error.

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Table of Cases and Authorities Cited.

Synopsis.

No. 24,962

In the Supreme Court
OF THE
United States

October Term, 1916

No. 269

THE STATE OF CALIFORNIA,
Plaintiff in Error,

vs.

DESERET WATER, OIL AND IRRIGATION COMPANY (a corporation),
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

Statement of the Case.

This action originated in a complaint filed by the corporation against the state of California to condemn all of section 16, township 1 north, range 25 east, M. D. B. and M., which admittedly was a section of school land granted to the state of California by the United States, and which was surveyed prior to the time when it was included within the boundaries

of the Mono Forest Reserve, a national reservation established by proclamation of the President. In the trial court the state set up by answer that the lands sought to be condemned were not subject to condemnation because they were situated within the boundaries of a national forest reservation (Trans. p. 4, folio 7). It was admitted at the trial that these lands were all within the Mono Forest Reserve (Trans. p. 4, folio 58). It was then shown by the state that the lands, being within a national forest reservation, had been withdrawn from sale and *could be used as bases for indemnity selections only;* that at least six hundred acres of the land sought to be condemned had been offered as bases for such selections, and scrip covering all of such six hundred acres had actually been sold at public auction to various individuals, none of whom were made parties to the action; that these certificates were sold for prices ranging from $2.80 to $3.45 per acre; that these certificates were issued on May 3, 1909, two years prior to the commencement of this action (June 23, 1911); and that the selections had all been accepted by the local United States land offices. As to the remaining forty acres it was shown that an indemnity certificate thereon was still outstanding (Trans. pp. 27 and 28, folios 58-60).

After judgment against the state an appeal was taken to the district court of appeal of the third appellate district. Among the assignments of error therein made is one numbered six, which reads as follows:

"6. The evidence does not prove or show that no part of said land has heretofore been appropriated to any public use" (Trans. p. 29, folio 63).

On the hearing before the court of appeal the state contended that the lands involved had been withdrawn from operation of eminent domain proceedings because, situated within a forest reserve, they could be used only as bases for indemnity selections, and that for the same reason they were devoted to another public use and hence not subject to condemnation.

The point at issue in this proceeding is: Do sections 2275 and 2276 of the United States Revised Statutes, as amended in 1891, authorize the exchange of school lands which were surveyed before they were included in the National Forest Reserve? More generally the question is whether when a state, which is the beneficiary of a school land grant from the United States, has by appropriate legislation withdrawn from sale such sixteenth and thirty-sixth sections as lie within national reservations and has by appropriate legislation declared that such sections shall be used only as bases for indemnity selections, the land so withdrawn may be condemned in eminent domain proceedings, particularly when such proceedings have been brought after the state has used the lands as contemplated in the legislation, and the selection of such lands as bases has been accepted by the local United States land offices.

The state court conceded that the lands could not be so condemned if the federal authorities had the power to accept such selections and to exchange such sections for other unappropriated government lands outside of

the forest reservations, but held that the federal authorities did not have such power if the section, as was the case here, was surveyed before the federal reservation was created. It was conceded that the laws of the state were ample and sufficient to effect the exchange of such lands, but the state court held that in so far as these surveyed sections were concerned, the state laws were ineffective because of the want of power in the federal authorities to act in that connection on behalf of the federal government. There was, therefore, clearly drawn in issue in the state court the question of "an authority exercised under the United States", and there was also drawn in question a "title, right, privilege * * * claimed under * * * a statute of * * * *or authority exercised under,* the United States," and the decision was against the claim so set up and against the validity of the authority exercised under the statutes of the United States. It is therefore a question which clearly comes within the purview of section 237 of the Judicial Code. It only remains to be determined whether the question was properly presented before the state courts.

To understand the position of the state it is necessary to examine briefly the state statutes involved.

Section 3408*b* of the California Political Code, which was added to the code by the Statutes of 1909, page 682, provides, in part, as follows:

> "All sixteenth and thirty-sixth sections, *both surveyed and unsurveyed,* which may now or may hereafter be included within the exterior boundaries of a national reservation, or of a reserve, or within the exterior boundaries of lands with-

drawn from public entry, shall be and are hereby withheld from sale by the state, *and the same shall hereafter be used only as bases for indemnity selections* as in this article provided." (Emphasis ours.)

Section 1240 of the Code of Civil Procedure read at the time of these proceedings, in part, as follows:

> "The private property which may be taken under this title (eminent domain) includes:
>
> 2. Lands belonging to this state * * * not appropriated to some public use. * * *
>
> 3. Lands belonging to the United States or owned or held by the United States in trust, or otherwise, for any purpose, except, etc."

Section 1248 of the Code of Civil Procedure provides, in part, that the court must ascertain

> "the value of the property sought to be condemned * * * and each and every separate estate or interest therein."

Assignment of Errors.

In the assignment of errors heretofore filed plaintiff in error has specified ten separate errors, but of those assigned no argument is presented on those specified as number one, number nine and number ten. The errors as originally assigned are as follows:

1. The supreme court of the state of California erred in holding and deciding that the plaintiff in error, the Deseret Water, Oil and Irrigation Company, a corporation, was authorized under the laws of the state

of California to maintain said action for the condemnation of the lands involved therein.

2. The supreme court of the state of California erred in holding and deciding that the lands involved in said controversy were not appropriated to the public use of the state of California.

3. The supreme court of the state of California erred in holding and deciding that the lands involved in said controversy were subject to be taken in eminent domain proceedings.

4. The supreme court of the state of California erred in holding and deciding that the lands involved in said controversy were not devoted to the public uses of the United States of America.

5. The supreme court of the state of California erred in holding and deciding that the lands involved in said controversy could not be exchanged by the state of California and the United States of America for other lands outside of the boundaries of said Mono Forest Reserve, in the absence of further legislation on the part of the Congress of the United States.

6. The supreme court of the state of California erred in holding and deciding that the offer of the state of California to transfer these lands to the United States of America in lieu of other lands situated outside of said Mono Forest Reserve did not remove said lands from the operation of the eminent domain provisions of the laws of the state of California.

7. The supreme court of the state of California erred in holding and deciding that the action of the state of

California in withdrawing the lands in controversy in said cause from sale, and offering them to the United States of America in lieu of other lands situated outside of said Mono Forest Reserve, did not pass to the United States of America an equitable interest in said lands by reason of which the United States of America became an interested and necessary party in said cause.

8. The supreme court of the state of California erred in holding and deciding that the United States of America, and the departmental officers acting therefor, were without authority to establish and maintain said Mono Forest Reserve and to devote the lands situated therein to the public use of the United States of America.

9. The supreme court of the state of California erred in holding and deciding that the complaint in said action stated a cause of action against the said defendant the state of California.

10. The supreme court of the state of California erred in holding and deciding that the plaintiff in said cause was entitled to take all of section sixteen (16), township one (1) north, range twenty-five (25) east, M. D. M., containing six hundred and forty (640) acres, in fee simple title.

I.

THE FEDERAL QUESTION INVOLVED.

Relying upon the provisions of the California statutes, the state contended before the court of appeal that the

lands, being located wholly within a national forest reservation, were not subject to condemnation because devoted to the public use—or more particularly to two separate uses—the state had devoted them to its use as bases for indemnity selections, and the United States had devoted them to its public use of the forest reserve.

There is no warrant for the claim that this defense was waived by failure of the state to specifically deny the allegations of the complaint that the lands were not devoted to a public use. The allegation was a mere conclusion of law which is not admitted by failure to deny, under California practice. The state alleged the existence of the forest reservation and the inclusion of the lands within it. If, then, the state's position is correct, the lands were, as a matter of law, appropriated to a public use by reason of being within a forest reservation. If the state's position is not correct, no allegation of fact would change the legal conclusion. The failure to deny an allegation impossible in law is not an admission of the truth of the allegation.

People v. Roach, 76 Cal. 296;
State v. Miller, 149 Cal. 208;
Louisville, etc., Co. v. Palmes, 109 U. S. 255.

Thus if sections 2275 and 2276 of the Revised Statutes contained the necessary authority to effect the exchange of these surveyed lands, they were, as a matter of law, appropriated to a public use, and no denial of the allegation of the complaint was necessary. In accordance with the understanding between the state and the federal authorities to exchange unsold school lands in forest reserves the act of 1909 known as the Thompson

Act was added to the California Political Code and numbered sections 3398 to 3409, inclusive. This act, in general terms, withdrew from sale all sixteenth and thirty-sixth sections situated within the boundaries of a national reserve, *whether surveyed or unsurveyed,* and authorized the state authorities to sell scrip upon such sections at public auction, which scrip enabled the holder to select other lands of equal area outside of the forest reserve in lieu of the school section situated within the forest reserve, and provided that as soon as the listing of the lieu selections was made the title to the bases passed to the federal government. The state act depended for its enforcement upon the authority of the government land office to effect the exchange of these selections. The federal law upon which the act depended is found in sections 2275 and 2276 of the Revised Statutes of the United States, as amended in 1891.

> "In substance those sections declare that when any of these school sections so conveyed to a state are lost to the state, either by superior claims of homestead or pre-emption settlers, or because they are mineral lands, or because they are included within any Indian, military, or other reservation, or because they are otherwise disposed of by the United States 'other lands of equal acreage are hereby appropriated and granted and may be selected by said state in lieu of such as may be thus' lost."
>
> Opinion Supreme Court in *Deseret, etc., Co. v. State of California,* 167 Cal. 147-153.

When the matter was presented to the court of appeal no question was made of the authority of the United

States land office to accept the exchanges or to carry out the plan of the state law above noted. The provisions of the state law were deemed sufficient and controlling by both parties and the court of appeal sustained the state's contention that the provisions of section 3408*b* above noted withdrew these lands from the operation of the eminent domain statutes and that court reversed the judgment of the trial court. The court also held that because of section 1248 of the Code of Civil Procedure requiring the trial court to determine the interest of all parties in the lands sought to be condemned, a judgment could not be entered in this case without giving to the United States an opportunity to be heard in support of the interest which it had in the lands.

Thereafter as stated in the argument of defendant in error, the provisions of sections 2275 and 2276 of the United States Revised Statutes were called to the attention of the state supreme court by the defendant in error herein in its petition for a hearing in that court after the decision of the court of appeal. The purpose of directing attention to these sections was to show a want of authority *on the part of the federal authorities* to exchange these lands because the section had been surveyed before the forest reserve was created.

The power of the federal authorities to do so was assumed by both parties at all stages of the proceedings up to that time. Section 3408*b* of the Political Code withdraws from sale and authorizes the exchange of all sixteenth and thirty-sixth sections "both sur-

veyed and unsurveyed". The action of the federal and state authorities in arranging to exchange this section was never attacked or questioned by defendant in error and their authority to do so was never contested until this petition for rehearing in the state supreme court was filed.

It was assumed by all parties that the power to carry out the provisions of section 3408*b* existed—the state making the contention that the lands, being within the forest reserve, were, upon the creation of the reserve, devoted to a public use, the use for indemnity purposes, and that scrip having been sold thereon and lieu selections having been accepted by the federal land office prior to the institution of this action, the United States had at least an equitable interest in the lands and the same were therefore devoted to the public uses of the forest reserve. Both sides assumed that the argument applied to surveyed as well as unsurveyed sections. Defendant in error denied that a public use existed. The state claimed that the creation of a forest reserve thereby appropriated to public use all lands situated therein under the control of the national government, and this contention was supported by the decision of this court in

Light v. United States, 220 U. S. 523,

and by the subsequent decision of the state supreme court in

Deseret, etc., Co. v. California, 167 Cal. 147.

In other words, the state supreme court sustained the contention of the state that a public use existed

when the lands were included within a national forest reserve, but held that these particular lands, not having come within the control of the national government *because they were surveyed lands,* were not appropriated to that public use.

Thus the decision of the court of appeal which was favorable to the state was set aside by the supreme court and the opinion of the supreme court thereafter rendered adversely to the state was based upon the interpretation of sections 2275 and 2276 of the United States Revised Statutes, given by the state supreme court in response to the petition for hearing therein. If, then, the defendant in error had not raised the question of the want of power of the federal officers the decision of the court of appeal in favor of the state would have become final.

The basis of the opinion of the supreme court is found on pages 54 and 55, folio 123 of the transcript, where the court said:

> "By appellant it is contended that notwithstanding the title to such a section has absolutely vested in it before the creation of a forest federal reservation, it has elected to surrender such section to the United States, seeking indemnity and compensation therefor under the federal indemnity grant provided for in the above cited sections of the federal statutes. And further the state contends that this federal grant is broad enough to include such selections as indemnity selections and that the interior department of the United States so construes the law. Furthermore, that the state has taken the appropriate step in the various federal land offices to accomplish this desired result, so that the present status of these

lands is that the state has offered them to the United States in exchange for other equivalent public lands belonging to the general government. Therefore, the conclusion is that the state has, at least in equity, parted with its title, which title in equity is reinvested in the United States.

If appellant's position in this matter is sound there is an end to the controversy and the trial court erred in awarding a judgment in condemnation."

In the briefs filed by the state in the supreme court it was argued that the departmental rulings of the department of the interior clearly showed that that department construed sections 2275 and 2276 as applying to surveyed, as well as to unsurveyed, sections. To this point the following decisions of that department were cited:

In re State of California, 28 Land Dec. 57;

In re Terr. of New Mexico, 29 Land Dec. 364;

Dunn v. State of California, 30 Land Dec. 608;

In re State of California, 34 Land Dec. 613.

Defendant in error relied on the decision of the United States circuit court in

Hibbard v. Slack, 84 Fed. 571,

which the state answered was not controlling because neither the state nor the federal authorities were parties to that action. The state also relied upon the decision of this court in

Weyerhaeuser v. Hoyt, 219 U. S. 380,

to the effect that the decisions of the department of the interior in this regard were controlling.

The supreme court denied the authority of the federal officers to effect the exchange of surveyed lands, though holding that if the state's claim that this authority did exist was sound, then the judgment of the trial court should have been reversed. No matter how the federal question may have been raised, it is clear from the reading of the opinion of the state supreme court that if that federal question had not been determined adversely to the claim of the state, a different judgment would have resulted. The position of defendant in error on this motion is that having raised a federal question in the state court itself and having procured a favorable final judgment in the state court through the determination of such federal question adversely to the plaintiff in error, this court has no jurisdiction to review the judgment because the federal question was not raised in the first instance by plaintiff in error. But we do not concede the claim of defendant in error, but contend that the federal question was put in issue by the plaintiff in error at the time of the trial of the action in the trial court.

That the state supreme court treated the federal question as properly before it is clear from the concluding paragraph of the opinion, which reads:

> "Finally it may be said that if the state shall believe its rights or interests to be affected by the adoption of the decisions of the federal courts in the construction of the federal statute, which is indisputably a matter of much moment, the path is clear to the supreme court of the United States, where the true and final construction of the statute will be given and all doubts put to rest."

Under these circumstances it can not be doubted that the federal question was raised before the state court and was so treated by the state court and was decided adversely to the right or privilege claimed by the state under the federal statute.

Mallinckrodt v. St. Louis, 238 U. S. 41-49;
Carlson v. Curtis, 234 U. S. 103-106;
Miedreich v. Lauenstein, 232 U. S. 236-243;
Atchison, Topeka & Santa Fe R. R. v. Sowers, 213 U. S. 55-63;
Supreme Lodge of K. of P. v. Mims, U. S. Advance Op. 1915—702-704;
Land and Water Co. v. San Jose Ranch Co., 189 U. S. 177-179.

Though independent state grounds were also presented to the state court, it is evident that the judgment would have been reversed if the court had not determined the federal question adversely to the claim of the state, as appears from its opinion:

> "If appellant's position in this matter be sound there is an end to the controversy and the trial court erred in awarding a judgment in condemnation."

When the court decides against plaintiff in error upon a federal question which it deems to have been properly brought before it, this court has jurisdiction to review the judgment.

Rogers v. Hennepin County, 240 U. S. 184-188.

And even though the pleadings do not in terms refer to a federal statute as determining the liability, if the state court has denied the liability under the federal

statute this court has jurisdiction to review the judgment.

Jones National Bank v. Yates, 240 U. S. 541-550;
Thomas v. Taylor, 224 U. S. 73, 78, 79;
Grand Trunk Railway v. Lindsay, 233 U. S. 42-48.

Here the state court accepted the state's contention that the statutes of the state were ample and sufficient to effect the exchange and transfer and that if such transfer had been made as contemplated by the state statutes, then the judgment against the state would have to be reversed, but the court held that the transfer had not been effected solely because of the want of authority in the federal officers. In other words, the reversal of the judgment depended upon the holding that the federal officers were without power to do what they had done and claimed the right to do under the federal statutes. The state showed that the plan adopted was one beneficial to the state because it was thereby enabled to dispose of lands at considerable profit, which otherwise it was not able to dispose of at all.

Whether a federal question has been properly raised in the state courts is a question of state practice, and if the highest court of the state "either decided or assumed that the records sufficiently presented a question of federal right and decided against the party asserting that right, the decisions of this court render it clear that it is our duty to pass upon the merits of the federal question".

North Carolina Railroad Co. v. Zachary, 232 U. S. 248-257;

Home for Incurables v. City of New York, 187 U. S. 155-167;
Land & Water Co. v. San Jose Ranch Co., 189 U. S. 177-179;
Haire v. Rice, 204 U. S. 291-299;
Chambers v. Balt. & Ohio R. R., 207 U. S. 142-148;
Miedreich v. Lauenstein, 232 U. S. 236.

II.

THESE LANDS WERE APPROPRIATED TO THE PUBLIC USE OF THE STATE OF CALIFORNIA.

The eminent domain statutes of California deny the right to condemn lands of the state or of the United States which are devoted to some public use. Section 1240 of the Code of Civil Procedure (as it read when these proceedings were had and before the amendment of 1915) provided:

> "The private property which may be taken under this title includes:
>
> 1. All real property belonging to any person;
>
> 2. Lands belonging to this state * * * not appropriated to some public use;
>
> 3. Lands belonging to the United States or owned or held by the United States in trust, or otherwise, except lands owned or held for light houses, post offices, or other government buildings, forts, arsenals, or other military purposes."

It is admitted that the lands involved in this controversy are situated within the confines of the Mono Forest Reservation (Trans. p. 27, folio 58). This reservation was established by proclamation of the Presi-

dent, and no question of the validity of the proclamation was raised by any of the parties to the action and the first suggestion that the President was without power to establish the reservation is that found in the opinion of the California supreme court. All of the section had been withdrawn from sale and reserved by the state for indemnity bases long prior to the institution of this action. Section 3408 *b* of the Political Code of California, added by the Statutes of 1909, page 682, provides that:

> "All sixteenth and thirty-sixth sections, both surveyed and unsurveyed, which may now or may hereafter be included within the exterior boundaries of a national reservation, or of a reserve, or within the exterior boundaries of lands withdrawn from public entry, shall be and are hereby withheld from sale by the state, and the same shall hereafter be used only as bases for indemnity selections as in this article provided."

By this withdrawal the state had decreed that these school sections should be devoted solely to the one public use and purpose, to wit, as bases for indemnity selections. Immediately upon the withdrawal they came within the excepted class mentioned in the eminent domain statute and were no longer subject to condemnation.

III.

THESE LANDS HAD BEEN WITHDRAWN FROM EMINENT DOMAIN PROCEEDINGS.

When the California legislature withdrew these sections from sale and declared that they should be used

as bases for indemnity selections only it thereby not only dedicated these lands to the public use but withdrew them from the operation of the eminent domain provisions of the statute.

It will be seen from this section of the code that it is the purpose of the state to withdraw from sale all of these sixteenth and thirty-sixth sections where situated within a national forest reservation, and to withhold the same for the purpose of indemnity selections as therein provided. The section provides that such lands shall "hereafter be used *only* as bases for indemnity selections as in this article provided". This amounts to a withdrawal of all of these school lands where situated within a national forest reservation, from the operation of the eminent domain statute. Reading this statute with section 1240 of the Code of Civil Procedure, the conclusion is that the legislature, in giving power of condemnation of state lands, intended that such power should apply to the acquisition only of such lands as are not authorized to be withdrawn from entry and sale. As the taking of property through the eminent domain process is an action *in invitum*, the statutes must be strictly construed not only as to the right of the taking, but as to the property which is made subject to be taken. It is entirely competent for the legislature to exempt from the operation of the eminent domain statutes all of the state's property, and in the adoption of section 3408 *b* of the Political Code, the intention to exempt school property within forest reserves is clear.

IV.

PROPERTY IN CONTROVERSY DEVOTED TO PUBLIC USE OF THE UNITED STATES.

These lands have a double public use. In addition to that mentioned in the foregoing paragraphs these lands have been devoted to the public use of the United States and in connection with the federal forest reservation.

That a national forest reserve is a public use, and that the property situated therein is devoted to a public use, seems too clear for argument.

In

Light v. United States, 220 U. S. 523, 537,

the supreme court of the United States, in sustaining the power of the United States to set aside such forest reserves, held:

> "All the public lands of the nation are held in trust for the people of the whole country. United States vs. Trinidad Coal Co., 137 U. S. 160. And it is not for the courts to say how that trust shall be administered. That is for Congress to determine. The courts cannot compel it to set aside the lands for settlement; or to suffer them to be used for agricultural or grazing purposes; nor interfere when, in the exercise of its discretion, Congress establishes a forest reserve for what it decides to be national and public purposes. * * *"

As will be seen from section 3408 *b* of the Political Code, it is the purpose of the state to relinquish its claim to all of the school lands situated within these forest reserves, and to turn the same back to the jurisdiction of the United States. Such being the case, the property, whether in the ownership of the United States

or of the state, becomes devoted to the public uses of a forest reserve immediately upon the establishment of the lines of the reservation.

V.

THE PROPOSED EXCHANGE WAS LEGAL WITHOUT FURTHER LEGISLATION.

The main question involved here, and the real basis of the decision of the California court, is the power and authority of the officials of the federal land office to accept the offer of the state and transfer to the state other lands in lieu of those in controversy. The error of the supreme court in this respect is designated as the fifth of the specified errors. Therein particularly is raised the federal question which is involved herein and which is fully discussed in the first subdivision of this brief. Whether the power exists in the federal officers depends upon the interpretation to be given to sections 2275 and 2276 of the United States Revised Statutes. If the federal officers are not clothed with such authority, there is an end to the controversy. If such authority exists, then the judgment in condemnation was erroneous because the federal authorities accepted the designation of these lands and the state authorities had done all that the law required of them to do towards the completion of the transfer. Prior to the institution of the action, the state had issued certificates of purchase to applicants who had purchased indemnity certificates covering the land described in the complaint, and

who had surrendered such certificates in accordance with the laws of the state and had selected other lands based thereon. The state is not in a position to supply new bases even if it were willing to do so, because at the present time there is pending a controversy between the state and the United States, based upon the claim made by the federal government that the state has overdrawn its school grant and the state has obligated itself to reimburse the government for any lands which it may have received above the amount to which it was legally entitled. In consequence of this controversy there is now pending before the general land office at Washington, awaiting certification to the state, applications covering over four hundred thousand acres of land within the state, included within which are the lands of the applicants above referred to, whose selections are standing upon both surveyed and unsurveyed school sections, the same having been used as a bases for such selections.

By the act approved December 24, 1911 (Stats. 1911, Extra Session, p. 108) the surveyor general is authorized to convey these surveyed school sections to the federal government in order to adjust and settle the controversy now existing. To permit such sections to be taken from the state and thus defeat the settlement agreed upon would be clearly against the intention of such act.

Practically the whole case of defendant in error depends upon the decision of

Hibbard v. Slack, 84 Fed. 571,

wherein it was held that there could be no indemnity or other selection based upon school land, the title to which

had vested in the state and that the only selections authorized by Congress are predicated upon a portion of the school grant being *lost* to the state. It should first be noted that this decision was had upon demurrer in an action in which neither the federal government nor the state of California were joined as parties. It is therefore binding on neither. It is a matter of common knowledge that the decision has never been accepted by the federal authorities and that as hereafter pointed out, the land department of the federal government has consistently held that it may exercise the power which the court in that case held that it did not have.

On the other hand, the state recognizing the possibilities which might arise from the decision enacted section 3408 *c* of the Political Code, which in part reads as follows:

> "In determining the bases in lieu of which the State is entitled to indemnity, the surveyor general shall also include all sixteenth and thirty-sixth sections which were surveyed at the time of the withdrawal of such lands from public entry, or at any time thereafter; *provided, however,* that should the *land department of the United States* determine that such surveyed sections are improper or invalid bases, then the surveyor general shall not be required thereafter to consider or treat said surveyed sections as valid or any bases for indemnity selections." (Emphasis ours.)

There is here shown a clear intention on the part of the state to include the surveyed, as well as the unsurveyed sections in the plan of transfer, notwithstanding the decision of the court in *Hibbard v. Slack,* and to eliminate the surveyed sections only in the event that the

land department of the United States should determine that it did not have power to accept surveyed sections as bases. This is further shown by the act of the California legislature approved April 24, 1909 (Stats. 1909, p. 1091), which reads as follows:

> "The selection of all lands heretofore made by the surveyor general from the government of the United States in lieu of surveyed school sections situated within the exterior boundaries of national reservations created by proclamation of the President of the United States and which have been listed to the state of California and also all such selections which are now pending before the land department of the United States, when listed to the state, are hereby declared to be good and valid and to vest the title of the United States and the state when said state shall have issued its patent therefor, to such lands in the applicant, his successors or assigns, for whom such selection was made, and the title of the state of California in and to such surveyed school sections so used as bases for such indemnity selections shall vest in the United States at the date of such listing to the state and the title of the said state shall be deemed to be released and quitclaimed to the said United States at the time of such listing to the state as aforesaid."

From the above it is clear that as to the one hundred and sixty acres of the land described in the complaint which had been used as bases for selection prior to the approval of the sections of the California Political Code above quoted, the state has surrendered the same to the United States and as soon as the selection is approved by the federal authorities, the title of the state by virtue of the above act will vest in the federal government without further action on the part of the state. Likewise it is clear that the state has authorized the use of

surveyed school sections situated within the exterior limits of national reservations as bases for lieu lands and indemnity selections.

It is a common rule that the right of eminent domain can be exercised only by the sovereignty or its agencies, and that when a private individual or corporation seeks to exercise the right of eminent domain it does so as the agent of the state. Such right can be exercised only under such authority as the state may give. Thus, where the state has divested itself of the title to certain lands, and has, as is the case here, granted such lands to the federal government, the grant to become effective upon the happening of a certain condition subsequent, which is in the control of the grantee and not the grantor, the state cannot defeat the grant by permitting one of its agencies to do something indirectly which the state itself could not do directly.

Section 3406 *a*, Political Code, provides:

> "*All sixteenth and thirty-sixth sections situated within the exterior boundaries of a permanent reservation,* and also all losses sustained by the state to its school grants, shall be and constitute valid bases for indemnity selections, as contemplated by this article and by law, but said base shall only be available when sold and indemnity certificates or scrip issued therefor, *and the surveyor general is authorized and empowered to forward to the United States land offices selections based thereon and where based upon surveyed school sections included within the exterior boundaries of permanent reservations, if the lands applied for are finally listed to the state in lieu of such surveyed school sections constituting such bases, then, and in that event, the title of the state to such bases shall vest in the United States without further act on the part of the*

state, and the title of the state to such bases shall be deemed to have been conveyed to the United States, as of the date of such listing. All selections heretofore made by the surveyor general, and which are now pending before the land department of the United States, based upon surveyed school sections situated within the exterior boundaries of a permanent reservation, shall be, if accepted by the United States land department, deemed to be valid bases, and, upon the listing of such lands, the title of the state to such surveyed school sections shall pass to and vest in the United States.'' (Emphasis ours.)

The above section in itself, in our opinion, clearly defeats the action of the defendant in error herein, under the undisputed testimony heretofore pointed out. It clearly appeared that these selections were awaiting approval before the general land office. If the lands applied for are listed to the state in lieu of the bases designated, the surveyed school sections, then and in that event, the title of the state thereto shall vest in the United States without further act on the part of the state, *and the title of the state shall be deemed to have been conveyed to the United States, as of the date* of such listing. Here is a clear grant by the state to the federal government of these lands, to take effect as soon as the lieu lands selected by the State are listed by the federal government. Under such circumstances how can it be possible to condemn these lands, without either making the United States a party, or the persons who have received certificates of purchase from the state for the lieu lands, on the faith of such acceptance by the federal government? The question of whether or not the general land office at Washington is authorized to

accept surveyed school sections is a question which is within the province of that department to determine; and, in this connection, it may be said that the interior department notwithstanding the decision of *Hibbard v. Slack, supra,* has uniformly held that under sections 2275 and 2276 of the Revised Statutes of the United States it is authorized to receive and accept from the state of California such surveyed school sections belonging to the state in exchange for vacant unappropriated public lands. Such has been the uniform rule and decision of the Department of the Interior since 1899. In this behalf we call the court's attention to the following decision of the Department of the Interior: In the case of state of California, volume 28, Land Decisions, pages 57-61, in a decision of the acting secretary to the commissioner of the general land office, it is said:

> "The land in section thirty-six is within the boundaries of the Sierra forest reservation established by executive order, dated February 14, 1893 (27 Stat. 1059). The section was surveyed prior to the establishment of the reservation. It is conceded by the state that full title to the tract in that section passed to it not later than the date of the public survey thereof, and that it was not thereafter within the power of the executive to reserve the same or in any way impair the state's right thereto. The state insists, however, that under the provisions of the said amended section it may be allowed to surrender the land to the United States and then take other public land in lieu thereof.
>
> It is urged that by reason of the inclusion and isolation of the land in section thirty-six within the boundaries of the reservation, the state is practically precluded from either leasing or selling it, or deriving revenue therefrom in any manner for the use of public schools, and that thus, unless it can surrender

the same and take other land in lieu thereof, the state's grant of lands for school purposes will, in this and many similar instances, suffer serious substantial loss; also, on the other hand, that, should the state succeed in selling or leasing such and similar tracts, its vendees or lessees would have necessarily a right of way over the reservation, thus destroying the integrity of the same and subjecting the territory within its boundaries to a divided jurisdiction—a condition which would seriously obstruct and interfere with the purposes of the reservation and probably be fruitful of confusion and controversies growing out of the attempts of the state and federal authorities to administer their respective laws. Such considerations as these, it is urged, doubtless influenced Congress to enact the legislation in question under which the state claims the privilege of relinquishing the land in section thirty-six and taking the other tract in lieu thereof. These are undeniably important considerations, and to be borne in mind in interpreting the said legislation.

As amended by the act of February 28, 1891, *supra,* section 2275, Revised Statutes, reads: * * *

'The above is general legislation applicable to all the states and territories to which public lands have been granted, reserved or pledged by acts of Congress. The section is readily divisible into four parts. There is first a grant of indemnity for lands settled upon which, on subsequent survey, are found to be in sections sixteen or thirty-six. Then follows a grant under which a state or territory may take lands in lieu of such of said sections as "are mineral land, or are included within any military, Indian, or other reservation, or are otherwise disposed of by the United States," to which is directly attached the important proviso that—

'Where any state is entitled to said sections sixteen and thirty-six or where said sections are reserved to any territory, notwithstanding the same may be mineral land or embraced within a military,

Indian, or other reservation, the selection of such lands in lieu thereof by said state or territory shall be a waiver of its right to said sections.'

The third grant is made 'to compensate deficiencies,' where those sections are fractional, or where one or both are wanting in the township. And last, there is made provision for ascertaining in advance of the public survey the number of school sections in any military, Indian or other reservation and for allowing indemnity without awaiting such survey. It is under the second division of the section that the state specifically claims the privilege of making the exchange above indicated.

In the decision under review it was said that the words 'before the survey,' which appear only in the first part of the section, were to be regarded as appearing in each of the other parts. Certainly it was not intended that these words should be inserted in the third division, because it could not be known that 'sections sixteen or thirty-six are fractional in quantity' until after survey, *and it is difficult to discover where these words could be interpolated in the second division of the section without substantially changing its meaning. Upon very careful consideration, the Department is of opinion that it was error to read these words into this part of the statute, and that it was the intention of Congress to make provision therein for the selection by a state or territory of other lands in lieu of the sixteenth and thirty-sixth sections included within a reservation, whether such sections had been surveyed prior or subsequent to the creation of the reservation. Read as a whole, and keeping in view the language used in its proviso, the second division of the section does not support the conclusion that Congress intended to confine the right of a state or territory to make lieu selections, to cases where sections sixteen and thirty-six were unsurveyed at the date of the reservation.* * * *

There are many statutes authorizing a selection of lieu lands; sometimes these selections are auth-

orized as indemnity for lands which were lost to a grant because they were otherwise disposed of or claimed, before the identification by survey or otherwise, of the lands passing under the grant; at other times, they are allowed in exchange for lands which have been identified as passing under a grant and to which the rights of the grantee have attached, but which are needed by the government for some reservation or other public purpose, or to enable it to discharge some claimed obligation to others. The terms 'indemnity' and 'lieu selection,' therefore, in the nomenclature of the public lands laws are not used simply to denote a compensatory allowance for lands which have been lost to a grantee, but are also at times employed to include the giving of one tract for another, the right to which is relinquished or waived by the grantee.

While it is not within the power of Congress or of the executive to divest the state of school lands after its right thereto has attached, the thing contemplated by this statute is an exchange made at the solicitation of the state and not a taking of its property against its will. * * * It is very desirable on the part of the United States that in all cases where reservations are made the land therein should be subject, as far as possible, to the same governmental authority and jurisdiction in order to successfully carry out the objects sought in creating them. It is believed, therefore, that the conclusion herein reached accords with the intent of Congress, and is in pursuance of a wise public policy. It gives to the state that which she reasonably asks—the right to select the tract herein described in lieu of the equal tract in section thirty-six, which is completely enclosed in the Sierra forest reservation. The selection, when approved, will operate as a waiver by the State of its right to the tract used as a basis. The exchange will apparently be mutually beneficial to both parties." (Emphasis ours.)

We have quoted from the above decision of the land department quite fully for the reason that it sets forth clearly and fully the ruling which has been uniformly followed by that department for more than twenty years. Thousands of acres of land have been accepted by the government and an equal amount listed or certified to the state in accordance with such rule. *It will be observed also, from the latter portion of the decision which we have italicized that there is absolutely no merit in the contention made by the respondent herein that because section 3408 b of the Political Code and the subsequent sections used the term "indemnity selections," the same are not applicable and do not comprehend an exchange of lands or a selection where the title had previously passed to the state. The term is used to include not only where indemnity or loss has been suffered but also, where an exchange of lands is intended and the words used in the sections must of course be construed in accordance with the meaning and breadth which have been given to such words by the general land office and which have been generally so understood and employed and used for many years. The above decision clearly shows the construction given to the terms "indemnity selection" and "lieu selection" and such expressions were used in the Political Code in view of the departmental construction of the general land office.*

In the case of

Territory of New Mexico, 29 L. D. 364,

Assistant Attorney General Van Devanter, in passing upon the same question involved in the decision last above referred to, confirmed that decision.

The same ruling was again made in the decision of

Territory of New Mexico, 29 L. D. 399.

See, also,

Dunn et al. v. State of California, 30 L. D. 608.

See, also, the case of

State of California, 34 L. D. 613.

The above decisions were made prior to the enactment of the Thompson Act at which time as will be observed from sections 3398 and 3406 of the Political Code as they then existed, the state had made no positive and specific provision for such exchanges as it has done by the terms of the Thompson Act and the provisions of the act of April 24, 1909, *supra.* But even under the terms of the sections as they existed prior to the Thompson Act the Department of the Interior held that the state of California had authorized the exchange of surveyed sections or, in other words, had authorized the waiver of its right to such sections in accordance with the authority and provision of sections 2275 and 2276 of the Revised Statutes of the United States, and acting upon that authority has accepted from the state a large number of these sections and listed to the state large tracts of land in lieu thereof. At this time there are now pending upward of *two hundred thousand of acres* of land before the Department of the Interior awaiting certification by that department and standing on such bases, *i. e.,* surveyed school sections situated within national reservations. The Department of the Interior is fully conversant with the decision of *Hibbard v. Slack* and has been willing to list lands to the state and accept

surveyed school sections in exchange therefor, and holds that that decision does not properly construe the language of the sections of the revised statute above referred to and further that such decision is not binding on the interior department. The power of the Secretary of the Interior is judicial.

Weyerhaeuser v. Hoyt, 219 U. S. 380.

The judgment of condemnation herein has not only had the effect of defeating the applicants who have received a certificate of purchase based upon selections made on the bases of the lands described in the complaint herein, but it will throw into endless confusion the titles of all those who have purchased lieu lands based on such surveyed sections. The decision, coming from the highest California court, has already had the effect of tying the hands of the land department as to all applications pending for lands in California because that department cannot safely certify applications for lands in a state whose courts refuse to recognize the federal title in the bases.

VI.

EFFECT OF THE OFFER OF THE STATE OF CALIFORNIA TO TRANSFER.

The state of California, not only in this proceeding, but at all times, has manifested a desire to use both surveyed and unsurveyed school sections as bases and has done all that is necessary to permit the transfer of such sections. It is not disputed that the laws of the

state are ample for this purpose as far as the laws of the state can go. The state has, acting under its laws, made a *bona fide* offer to the federal government to transfer these surveyed sections for lands belonging to the United States and it has never at any time, by legislative act or otherwise, evidenced any desire to withdraw that offer nor to permit its officers or any of its agencies to withdraw the offer for it or to interfere with the consummation of the transfer. It is for this reason that the state now contends that its offer to transfer the lands involved in this action to the federal government is valid, existing and unrevoked and that the authority given by the state to condemn lands for public purposes does not expressly or impliedly authorize a revocation of that offer. The state having made the offer and not having revoked it, it is still effective and the title to the land vests in the federal government whenever the federal authorities make the listings of other lands in lieu of those covered by the offer.

VII.

THE EQUITABLE INTEREST TO THE LANDS PASSED TO THE UNITED STATES.

By reason of the offer of the state to transfer these lands to the federal government, by reason of the provisions of the laws of the state above noted to the effect that title thereto should vest in the United States at the time of the listings, the United States of America has acquired an equitable interest in these lands by reason

of which it has become an interested and necessary party to the action. Section 1248 of the Code of Civil Procedure provides in part that in a condemnation proceeding the court before the entry of judgment must ascertain

> "the value of the property sought to be condemned * * * and each and every separate estate or interest therein".

Manifestly this cannot be done unless the owner of each separate estate and interest in the lands are joined as parties and permitted to defend their separate estates and interests. The opinion of the district court of appeal of the third district of California, which was reversed by the supreme court of California in the case at bar, clearly stated the state's position in this respect as follows:

> "But at any rate, we think it apparent that the United States is a necessary party to the final determination of the controversy and should be joined in the litigation. As we have seen, the state has done all it could to divest itself of title to the land, at least to 600 acres of it, has sold its scrip and the lieu selection has actually been made and approved by the local land office, and the only thing remaining to vest complete title in the United States is the affirmance by the general land office of the action of the local department. Under these circumstances it is manifestly a matter of grave concern to the United States whether this land is still available as the basis for an indemnity selection. It has a direct interest in that question and so has the plaintiff in the consideration of whether the general land office shall approve or has approved of the selection. Indeed, it may be that before judgment was rendered for plaintiff the title to the

land vested in the United States by virtue of the approval of said selection. In that event, plaintiff previously having notice of the proceedings before the land department pending at the time the suit for condemnation was instituted and the United States not being a party thereto, its title would not be destroyed but there would be probably a cloud upon it by virtue of said decree of condemnation."

The supreme court rejected this portion of the opinion not because of any disagreement as to the necessity for the joinder of all parties in interest in an action of this nature, but because of the holding that by reason of the want of power of the federal officers to make the listings, the United States never became an interested party in this action and never acquired any interest, legal or equitable, in the lands.

VIII.

THE QUESTION OF THE VALIDITY OF THE FOREST RESERVE.

The opinion of the supreme court of California in this case discusses conservation and the policy of national reserves, and casts a doubt upon the power of the federal authorities to establish a forest reservation in the first instance and to withhold government lands under reserve for such purposes. These questions were not within the issues, were not material to the determination of the cause and were not discussed or argued by either of the parties. Whether the national policy of conservation is wise or unwise or beneficial or detrimental to the state is a question which the

record in this case does not present and one which we are not called upon to defend or to denounce. It cannot be denied, however, that this opinion has cast a doubt upon the legality of national forest reservations established and maintained in the state of California, and out of this doubt a cloud has been cast upon the title of all land owners who have acquired possession of government lands through lieu selections based upon either surveyed or unsurveyed lands situated within the boundaries of such forest reservations. We believe that the opinion of the United States supreme court in

Light v. United States, 220 U. S. 523,

sets at rest any question of the power of the federal government to establish and maintain such forest reservations. In that opinion this court said (p. 536):

> "The United States can prohibit absolutely or fix the terms on which its property may be used. As it can withhold or reserve the land, it can do so indefinitely."

The California supreme court relied upon the early case of

Pollard, et al. v. Hagan, et al., 3 How. 212,

decided in 1845.

It would seem to follow without argument that if there be anything in conflict in these two opinions of this court that the opinion in *Light v. United States,* decided in 1910, would control. We do not, however, believe that the decisions are in conflict. The only thing decided in the Pollard case was that Congress had no power to grant land in Alabama which was below usual

high water mark at the time Alabama was admitted into the Union. The Light case directly involved the power of Congress to "constitutionally withdraw large bodies of land from settlement without the consent of the state where they are located", in view of the provisions of section 3 of article IV of the constitution of the United States. The precise point at issue here having been considered and determined in the Light case, there can be little doubt that, as far as this court is concerned, the power of Congress and the federal officers acting thereunder to withdraw land from settlement without the consent of the state where it is located and to include such land within a forest reservation has been expressly confirmed.

Upon the foregoing it is respectfully submitted that the judgment of the state court should be reversed.

Dated, San Francisco,
December 27, 1916.

U. S. WEBB,
Attorney General,
State of California,

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State of California,
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SUBJECT INDEX.

TABLE OF CASES.

In the Supreme Court of the United States.

OCTOBER TERM, 1916.

THE STATE OF CALIFORNIA, PLAINTIFF IN ERROR,
v.
DESERET WATER, OIL & IRRIGATION COMPANY.
No. 269.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

BRIEF ON BEHALF OF THE UNITED STATES, FILED BY LEAVE OF COURT.

The Supreme Court of California in its decision of January 20, 1914 (138 Pac. 981), and found at page 52 of the record, placed the following construction upon sections 2275 and 2276 of the Revised Statutes of the United States, as amended by the act of February 28, 1891 (26 Stat. 796):

> The Federal law to which these provisions of the State law are manifestly and admittedly addressed are sections 2275 and 2276 of the Revised Statutes of the United States as amended in 1891. In substance those sections declare that when any of these school

sections so conveyed to a State are lost to the State, either by superior claims of homestead or pre-emption settlers, or because they are mineral lands, or because they are included within any Indian, military, or other reservation, or because they are otherwise disposed of by the United States "other lands of equal acreage are hereby appropriated and granted and may be selected by said State in lieu of such as may be thus" lost. By appellant it is contended that notwithstanding the title to such a school section has absolutely vested in it before the creation of a forest Federal reservation, it has elected to surrender such section to the United States, seeking indemnity and compensation therefor under the Federal indemnity grant provided for in the above cited sections of the Federal statutes. And further the State contends that this Federal grant is broad enough to include such selections as indemnity selections and that the Interior Department of the United States so construes the law. Furthermore, that the State has taken the appropriate steps in the various Federal land offices to accomplish this desired result, so that the present status of these lands is that the State has offered them to the United States in exchange for other equivalent public lands belonging to the General Government. Therefore, the conclusion is that the State has, at least in equity, parted with its title, which title in equity is reinvested in the United States.

(3) If appellant's position in this matter be sound there is an end to the controversy and the trial court erred in awarding a judgment in

condemnation. But while one party may offer to contract, the assent of the other party to the offer must in some way be evidenced before any rights, legal or equitable, can spring into existence. As it is unquestioned that the control of the public domain is vested in Congress alone, and that only Congress can dispose of the public lands of the United States, the first inquiry must be directed to ascertain what Congress has done in the matter. It is conceded that all that it has done—the only provision that it has made for a case such as this—is disclosed by the language of the Federal statutes above cited. But herein it is to be observed that all that Congress had in contemplation in passing these statutes was to indemnify States and Territories for losses of school sections, which losses might befall the State for the reasons therein given. Further, it is to be observed that the only grant which Congress made was of lands to make good such losses—lieu lands by way of indemnity. And finally it is to be noted that the statutes of this State above referred to treat and speak of the acquisition by the State of other lands solely by way of indemnity. This language is strictly appropriate to those school sections lost to the State for the various reasons indicated, as by the prior right of settlers or purchasers, as by the fact that they were mineral lands, as by the fact that they were within declared military, Indian, forest, or other national reservations, and as by the fact that before survey they were put within such reservations. But indemnification means nothing

other than the making good of a loss. (*Slade* v. *County of Butte*, 14 Cal. App. 453; *Johnston* v. *Morris*, 72 Fed. 890.) The Federal grant was strictly an indemnity grant and nothing else. Such would appear manifest from a reading of the language of the Federal statutes and such is the decision of the Circuit Court of the United States in the carefully considered and elaborately reasoned case of *Hibberd* v. *Slack*, 84 Fed. 571, and the conclusion necessarily follows that a section such as this may not be exchanged with the United States under the indemnity grant provided for by section 2275 of the Revised Statutes of 1891. But against this it is urged that notwithstanding the decision of the United States Circuit Court upon this very Federal statute, we should ignore that decision and follow the rulings of the Interior Department, which rulings have permitted such exchanges. In this behalf it is argued that the Secretary of the Interior is himself vested with judicial functions and that his construction, or his solicitor's construction, of the statute should be preferred and adopted. It is the duty of this court to adopt the construction of the statutes of the United States given by the courts of the United States. We have in at least the two cases above cited declarations by those courts as to the scope and meaning of the indemnity grant in question. (4) That grant does not contemplate an exchange of lands between the State and the United States, but the making good to the State of a loss which it may sustain in a failure to get land which the United States attempted

to grant to it. It is a novel proposition to say that the ruling of an executive department should stand superior on the construction of a Federal statute to the solemn adjudication of a court charged with the express duty of announcing the meaning of a statute in a litigated controversy over that meaning. It certainly requires no citation of authority to show that the construction so placed by a Federal court upon a Federal statute is superior to such a departmental ruling. And equally certain is it that though the Interior Department may elect to ignore the decisions of the courts of the United States, it is still not within the power of such a department to give, to sell, or exchange the public domain without authority from Congress. And if, as the Federal courts have decided, Congress has not given the department such authority, the department's efforts and acts in the exchange of such land when brought before a judicial tribunal, will be declared null and void. (5) The conclusion upon this branch of the consideration therefore necessarily must be that while the State of California has by appropriate legislation offered to exchange such lands for other lands of the United States, there is no law of the United States authorizing such an exchange, and no act of the Congress of the United States taken in contemplation of any such exchange, present or future.

The above construction is in conflict with that adopted by the Secretaries of the Interior in the administration of the public-land laws on behalf of

the United States, beginning with the decision dated January 30, 1899, by Acting Secretary Ryan, approved by the then Assistant Attorney General Van Devanter. (*State of California*, 28 L. D. 57.)

QUESTION.

The main question presented is: Do sections 2275 and 2276 of the Revised Statutes, as amended by the act of February 28, 1891, authorize a State to waive its right or title to a section 16 or 36, granted to it in aid of common schools, surveyed prior to the establishment of a national forest within whose limits it is situate, and select nonreserved public lands in lieu thereof, and also empower the United States to allow such an exchange or indemnity?

INTEREST OF THE UNITED STATES.

The United States and many persons who have succeeded to it in title have a very large interest in this question. The land department has consistently followed the ruling of Acting Secretary Ryan in *State of California* (28 L. D. 57) and in accordance with this interpretation of the statute the Secretary of the Interior has approved school indemnity selections made on the bases of surveyed school sections within national forests aggregating more than 800,000 acres, and there are now pending in the Interior Department unapproved selections aggregating nearly half that quantity. (See the hearings before the House Committee on the Public Lands on H. R. 8491, 64th Cong., 1st sess., p. 50.)

If the decision of the California Supreme Court properly construes the Federal school indemnity act of February 28, 1891, there was no authority for the action of the Interior Department and the States have no valid title to the lands they have thus selected while the Government, on the other hand, has failed to acquire title to the school sections upon which the State's selections were based.

Not only has the United States vast property interests dependent upon the determination of the question, but in its governmental capacity it is deeply concerned in preventing, if it can properly do so, the confusion necessarily resulting from a disturbance of the title to more than three-fourths of a million acres of land held by those who have in perfect good faith relied upon the action of the Interior Department.

ANALYSIS OF THE ACT OF FEBRUARY 28, 1891, AMENDING SECTIONS 2275 AND 2276, REVISED STATUTES.

The act of February 28, 1891, which amended sections 2275 and 2276, Revised Statutes, provides:

> SEC. 2275. (1) Where settlements with a view to preemption or homestead have been or shall hereafter be made before the survey of lands in the field, which are found to have been made on sections sixteen or thirty-six, those sections shall be subject to the claims of such settlers; and if such sections, or either of them, have been or shall be granted, reserved, or pledged for the use of schools or colleges in the State or Territory in which they lie, other lands of equal acreage are hereby

appropriated and granted, and may be selected by said State or Territory, in lieu of such as may be thus taken by preemption or homestead settlers. (2) And other lands of equal acreage are also hereby appropriated and granted and may be selected by said State or Territory where sections sixteen or thirty-six are mineral land, or are included within any Indian, military, or other reservation, or are otherwise disposed of by the United States: (3) *Provided*, Where any State is entitled to said sections sixteen and thirty-six, or where said sections are reserved to any Territory, notwithstanding the same may be mineral land or embraced within a military, Indian, or other reservation, the selection of such lands in lieu thereof by said State or Territory shall be a waiver of its right to said sections. (4) And other lands of equal acreage are also hereby appropriated and granted and may be selected by said State or Territory to compensate deficiencies for school purposes, where sections sixteen or thirty-six are fractional in quantity or where one or both are wanting by reason of the township being fractional, or from any natural cause whatever. (5) And it shall be the duty of the Secretary of the Interior, without awaiting the extension of the public surveys, to ascertain and determine, by protraction or otherwise, the number of townships that will be included within such Indian, military, or other reservation, and thereupon the State or Territory shall be entitled to select indemnity lands to the extent of two sections for each of said

townships, in lieu of sections sixteen and thirty-six therein; but such selections may not be made within the boundaries of said reservations: (6) *Provided, however,* That nothing herein contained shall prevent any State or Territory from awaiting the extinguishment of any such military, Indian, or other reservation and the restoration of the lands therein embraced to the public domain and then taking the sections sixteen and thirty-six in place therein; but nothing in this proviso shall be construed as conferring any right not now existing.

SEC. 2276. That the lands appropriated by the preceding section shall be selected from any unappropriated, surveyed public lands, not mineral in character, within the State or Territory where such losses or deficiencies of school sections occur; and where the selections are to compensate for deficiencies of school lands in fractional townships, such selections shall be made in accordance with the following principles of adjustment, to wit: For each township, or fractional township, containing a greater quantity of land than three-quarters of an entire township, one section; for a fractional township containing a greater quantity of land than one-half and not more than three-quarters of a township, three-quarters of a section; for a fractional township containing a greater quantity of land than one-quarter and not more than one-half of a township, one-half section; and for a fractional township containing a greater quantity of land than one entire section and not more than one-quarter

of a township, one-quarter section of land: *Provided*, That the States or Territories which are, or shall be, entitled to both the sixteenth and thirty-sixth sections in place shall have the right to select double the amounts named, to compensate for deficiencies of school land in fractional townships.

The numbering of the sentences has been inserted for more convenient reference hereafter. The original sections 2275 and 2276, Revised Statutes, provided:

SEC. 2275. Where settlements with a view to preemption have been made before the survey of the lands in the field, which are found to have been made on sections sixteen or thirty-six, those sections shall be subject to the preemption claim of such settler; and if they, or either of them, have been or shall be reserved or pledged for the use of schools or colleges in the State or Territory in which the lands lie, other lands of like quantity are appropriated in lieu of such as may be patented by preemptors; and other lands are also appropriated to compensate deficiencies for school purposes, where sections sixteen or thirty-six are fractional in quantity, or where one or both are wanting by reason of the township being fractional, or from any natural cause whatever.

SEC. 2276. The lands appropriated by the preceding section shall be selected, within the same land district, in accordance with the following principles of adjustment, to wit: * * *.

Senate bill 1395, Fifty-first Congress, later became the act of February 28, 1891. As originally introduced it did not contain the sentences marked 3, 5, and 6. These sentences were incorporated by amendment in the Senate, and the bill, as so amended, passed that body May 3, 1890. As introduced, therefore, it read:

> SEC. 2275. Where settlements with a view to pre-emption or homestead have been, or shall hereafter be made, before the survey of the lands in the field, which are found to have been made on sections sixteen or thirty-six, those sections shall be subject to the claims of such settlers; and if such sections, or either of them, have been or shall be granted, reserved, or pledged for the use of schools or colleges in the State or Territory in which they lie, other lands of equal acreage are hereby appropriated and granted, and may be selected by said State or Territory, in lieu of such as may be thus taken by pre-emption or homestead settlers. And other lands of equal acreage are also hereby appropriated and granted, and may be selected by said State or Territory where sections sixteen or thirty-six are mineral land, or are included within any Indian, military, or other reservation, or are otherwise disposed of by the United States. And other lands of equal acreage are also hereby appropriated and granted, and may be selected by said State or Territory to compensate deficiencies for school purposes, where sections sixteen or thirty-six are fractional in quantity, or where

one or both are wanting by reason of the township being fractional, or from any natural cause whatever.

Upon the bill in this form, that is, without sentences 3, 5, and 6, the Commissioner of the General Land Office, with the approval of the Secretary of the Interior, reported favorably February 7, 1890. The report may be found in volume 299, part 4, Congressional Record, Fifty-first Congress, second session, page 3465. After pointing out that sentence No. 1 is practically the same as the original section 2275, Revised Statutes, with the addition of homestead settlements to those of preemptors, and that sentence No. 2 is an addition, the report stated:

> The only increase in the amount granted by this bill over the original, so far as I can see, is in making the right to select in lieu of mineral lands applicable to all the States and Territories, instead of confining it to a few, as heretofore; and the only change in the method of making selections is that which authorizes the selections to be made from any unappropriated, surveyed public lands, not mineral in character, within the State or Territory, instead of confining them to the same land district in which the losses or deficiencies occur, as heretofore.
>
> I approve the amendments proposed, as calculated to remove obscurities and incongruities in the laws with regard to the appropriation of public lands to support of schools in the States and Territories in which they lie, to make clear and more specific the limits of

> selection of indemnity for lands lost in place, thereby simplifying and facilitating the examination and passing upon indemnity selections in this office, and with regard to indemnity for school lands taken by homestead settlers and otherwise under general laws, to embody clearly in the statute by express provisions principles heretofore left to departmental construction.

Upon March 11, 1890, the department reported favorably upon the amendment which later became sentence No. 5.

It will be conducive to clarity to analyze this statute under the divisions as made above, taking each sentence singly. Sentence No. 1 reads:

> Where settlements with a view to preemption or homestead have been, or shall hereafter be made, before the survey of the lands in the field, which are found to have been made on sections sixteen or thirty-six, those sections shall be subject to the claims of such settlers; and if such sections, or either of them, have been or shall be granted, reserved, or pledged for the use of schools or colleges in the State or Territory, in which they lie, other lands of equal acreage are hereby appropriated and granted, and may be selected by said State or Territory, in lieu of such as may be thus taken by preemption or homestead settlers.

There can be no question under this sentence that it is only settlements made prior to the survey of section 16 or 36 in the field that make such sections a proper base for indemnity selection.

Sentence No. 2 reads:

> And other lands of equal acreage are also hereby appropriated and granted, and may be selected by said State or Territory where sections sixteen or thirty-six are mineral land, or are included within any Indian, military, or other reservation, or are otherwise disposed of by the United States.

The law at the time of the passage of this act was that title vests in the State at the time of survey, unless the land is at that time known to be mineral in character. The State is not entitled to a section 16 or 36 if it is known to be mineral in character at the time of survey, even if the grant does not expressly exclude mineral land. (See *Mining Co.* v. *Consolidated Mining Co.*, 102 U. S. 167; *Heydenfeldt* v. *Daney Gold & Silver Mining Co.*, 93 U. S. 634; *United States* v. *Morrison*, 240 U. S. 192–204.) A discovery of mineral after survey would not impair the State's title. The phrase "are mineral land" should accordingly be construed in the light of the existing law, and this sentence therefore does not warrant the selection of indemnity lands in lieu of sections upon which a discovery of mineral is made subsequent to the survey.

Sentence No. 2 then continues:

> * * * where sections 16 or 36 * * * are included within any Indian, military, or other reservation, or are otherwise disposed of by the United States:

As before stated, the title to sections 16 and 36 vests in the State, at least at the time of the survey. The title having so vested, the United States is without power to make the lands a part of a Federal reserve without the consent of the State. The word "included" can be given two interpretations, viz, inclosed within the boundaries of a reservation or made a part of the reservation. However, the phrase "or are otherwise disposed of by the United States," indicates that the sections mentioned in this sentence are those to which title had not vested in the State at the time of the creation of the reservation or the unsurveyed sections, as the United States has no power to dispose of the surveyed sections by making them part of a reservation or otherwise. Standing by itself this sentence would not authorize the acceptance of a section surveyed prior to the creation of a reservation as the basis of an indemnity selection. The next sentence, No. 3, reads:

> *Provided,* Where any State is *entitled* to said sections sixteen and thirty-six, or where said sections are reserved to any Territory, *notwithstanding* the same may be mineral land or *embraced* within a military, Indian, or other reservation, the selection of such lands in lieu thereof by said State or Territory shall be a waiver of its *right* to said sections.

As above pointed out, this provision was placed in the measure by amendment in the Senate. It was never reported upon by the Department of the Interior and was passed by both Senate and House

without any discussion. We are, therefore, limited to ascertaining its meaning from its own language, a comparison with the remaining parts of the act of February 28, 1891, the law existing at the time, and the surrounding legislative circumstances.

The word "entitled" is susceptible of two interpretations, that is, lands to which the State was entitled, or, in other words, to which full title in it had vested, or lands which the State had the right to receive in the future, its title being merely inchoate or prospective. The word "embraced" is also susceptible of two interpretations, that is, embraced within the limits of a reservation or made a part of the reservation. The word "right" is again susceptible of two interpretations, that is, lands which the State owned, or otherwise lands of which it would later become the owner. As above pointed out, the State was not entitled under either interpretation of that word to lands known to be mineral at the time of the survey. However, this provision reads:

> Where any State is entitled to said sections sixteen and thirty-six, * * * *notwithstanding the same may be mineral land* * * *.

This can have no application to any sections except those which had been surveyed prior to the discovery of mineral, in other words, sections to which the full title had already vested in the State, as those were the only kind to which the State was entitled, notwithstanding their mineral character. To place any other construction upon this language would make the enactment of this sentence a super-

fluity, as authority to make indemnity selections for lands known to be mineral at the time of the survey had already been fully given in sentence No. 2. The provision concerning lands embraced in any reservation reads:

> Where any State is entitled to said sections sixteen and thirty-six, * * * notwithstanding the same may be * * * embraced within a military, Indian, or other reservation, * * *.

This is in immediate juxtaposition to the enactment concerning mineral lands, which, as above pointed out, can apply only to sections which had already vested in the State. Logically, therefore, the provision concerning sections 16 and 36, embraced in a reservation, relates to the same subject matter; that is, sections to which full title had already vested in the State. To construe it otherwise would make this sentence unnecessary, as the matter of sections, which had been disposed of by the United States prior to the vesting of title in the State, had already been covered by sentence No. 2. This sentence then reads:

> The selection of such lands in lieu thereof by said State or Territory shall be a waiver of its *right* to said sections.

The word "right," as already stated, is susceptible of two constructions. Sentences Nos. 2 and 3 should be construed together and a harmonious construction, which will give effect to both, placed thereon.

Under such construction the State may take indemnity for lands included prior to reserve thereof in a forest reservation under No. 2, and for lands previously surveyed under sentence No. 3, the selection in both cases operating as a waiver of the State's right or title.

Sentence No. 4 is practically a reenactment of that part of the original section, No. 2275, which read:

> * * * and other lands are also appropriated to compensate deficiencies for school purposes, where sections sixteen or thirty-six are fractional in quantity, or where one or both are wanting by reason of the township being fractional, or from any natural cause whatever.

Sentence No. 5 was new legislation and enabled the State to take indemnity for unsurveyed sections without awaiting survey. The sentence numbered 6 merely declared the existing law; that is, instead of taking indemnity for sections 16 and 36, which were included in a reservation prior to survey, the State could await the extinguishment of the reserve. Under sentence No. 3 the State could, at its option, retain sections to which title had vested in it prior to the creation of the reservation or select other land in lieu thereof. The last phrase of sentence No. 6, "but nothing in this proviso shall be construed as conferring any right not now existing," was designed to prevent the assertion by the State of any right to lands included in a reservation prior to survey not recognized by existing law.

Section 2276, as amended, provides:

> That the lands appropriated by the preceding section shall be selected from any unappropriated, surveyed public lands, not mineral in character, within the State or Territory where such losses or deficiencies of school sections occur; * * *

This is partly taken from the old section 2275, which has been quoted above. The word "deficiencies" relates to sections found fractional or missing upon survey. The word "losses," which is an addition to the original language, may include either a voluntary or involuntary loss, and as such includes both lands which the State lost by reservation before vesting of its title, or to lands voluntarily relinquished by it under sentence No. 3.

The above analysis of the act itself and its legislative history demonstrates that a section 16 or 36, surveyed prior to the establishment of a national forest, is a valid basis for an indemnity selection under the act of February 28, 1891.

DEPARTMENTAL AND COURT DECISIONS.

The act of February 28, 1891, has received conflicting constructions, as far as the question here under consideration is concerned, from the Land Department and by one of the Federal circuit courts.

In *Gregg et al.* v. *State of Colorado* (15 L. D. 151), Secretary Noble, upon August 5, 1892, held that where lands were included in a military reservation prior to survey, the title did not vest in the State, which, however, could take indemnity. The State,

in that case, had made its indemnity selections. Secretary Noble, however, further stated at page 154:

> But independently of this, the act of February 28, 1891 (26 Stat. 796), provides that: "Where any State is entitled to said sections 16 and 36, or where said sections are reserved to any Territory, notwithstanding the the same may be mineral land, or entered within a military, Indian, or other reservation, the selection of such lands in lieu thereof by said State or Territory shall be a waiver of its right to said sections."
>
> Conceding that the school grant attached to the specific sections after they were designated by survey, the State having selected equivalent land in lieu thereof, the Government may hold the State to its waiver of the school section and dispose of it as part of the public domain.

This is in harmony with the view expressed previously in this brief.

The circular of December 19, 1893 (17 L. D. 576), approved certain instructions to registers and receivers. The fourth paragraph thereof provided:

> Fourth, that selections upon the basis of surveyed school sections within the said forest reservations will not be allowed under any circumstances; and all applications upon this character of basis now on file will be rejected, and the selections canceled.

This language was exceedingly broad and the instruction was apparently approved without consideration of the questions involved therein. Taken

literally, it would apply to all surveyed school sections, whether surveyed prior or subsequent to the creation of a forest reservation. The State of California requested a modification of these instructions so as to permit the State to select indemnity for school sections within a forest reservation, surveyed as well as unsurveyed, contending that such was the right of the State under existing law. (See *State of California*, 19 L. D., 585.)

In the last cited case, Secretary Smith, December 27, 1894, held that the act of February 28, 1891, did not authorize school indemnity selections in lieu of surveyed school sections that are subsequently included within the boundaries of a forest reservation, disagreeing with the opinion of the then Commissioner of the General Land Office. The reasoning upon which this holding was based is as follows:

At page 587, Secretary Smith says:

> It seems clear to me, however, that in reading and applying section 2275, *supra*, the date of survey is the point of time to be kept in view throughout. The words "before the survey" are specifically used in the first sentence which relates to school sections found to be settled upon prior to survey, and the remaining sentences are, as I construe the section, to be read as if the words "before the survey" appeared in each.

This reasoning is, we believe, faulty. The words "before the survey" used in sentence No. 1, need not necessarily, from the viewpoint of either logic or grammatical construction, be incorporated into the

remaining sentences. In fact, they can not be incorporated into sentence No. 4, as a deficiency resulting in a fractional township can not, in the nature of things, be ascertained until after survey.

It is then stated:

> I apprehend the State would most likely take this view, if, under the second sentence of the section, a sixteenth or thirty-sixth section should long after survey be found to contain valuable mineral, and the Government should for that reason dispose of or attempt to dispose of said lands as mineral land, and remand the State to the selection of indemnity therefor, and in doing so it would be sustained by the decisions of this department and of the courts.

There is no dispute that title vests in the State upon survey if the lands are not then known to be mineral in character, and that the United States could not dispose of them or impair the State's title. However, this statement absolutely overlooks sentence No. 3, which authorizes the State to select indemnity for lands to which it is "entitled," "notwithstanding the same may be mineral land," which, as above pointed out, can refer only to surveyed sections. Secretary Smith then said:

> Much stress is laid upon the word "entitled" as used in the proviso in said second sentence, it being urged that "entitled" means having title, and as the State has no complete title until after survey, that said proviso must have reference to surveyed lands. Such contention,

> if accepted, proves too much, for while indemnity would in such view be provided for surveyed school sections found to be mineral, or in a reservation, there would be no provision for indemnity where such sections are reserved or found to be mineral prior to survey. In other words, it would provide for taking from the State that to which it has by survey acquired complete title, and granting indemnity therefor, while the same thing would not be done while the right of the State is a mere float awaiting survey to give it definiteness and fixity.

This reasoning is again faulty, as it wholly overlooks the provisions of sentence No. 2, under which the State may take indemnity for sections ascertained to be mineral or in a reservation prior to survey.

It is then stated:

> This view is further sustained by the last sentence of said section 2275, which provides for the protraction of surveys over reservations for the purpose of ascertaining the number of townships therein, and thus the number of school sections for which indemnity may be selected.

The view is neither sustained nor overthrown by the provisions of the act cited (sentence No. 5), as that was designed simply to permit the State to make indemnity selections without awaiting survey of all lands within a reservation.

The last argument of Secretary Smith is:

> The executive reservation herein referred to was made pursuant to the provisions of section 24 of the act of March 3, 1891 (26 Stat. 1095), passed only three days subsequent to the approval of the act of February 28, 1891. Said section reads as follows:
>
> "That the President of the United States may, from time to time, set apart and reserve, in any State or Territory having public land bearing forests, in any part of the public lands wholly or in part covered with timber or undergrowth, whether of commercial value or not, as public reservations; and the President shall, by public proclamation, declare the establishment of such reservation and the limits thereof."
>
> It is to be observed that this section provides for the reservation of "*public lands.*" Under the decisions cited herein, school sections, surveyed and unincumbered at the date of survey, are not public lands, but are the property of the State, and the act of March 3, 1891, or any proclamation thereunder, could not operate upon them.

It should be noted that section 24 of the act of March 3, 1891, has a faulty grammatical construction. The verbs "set apart" and "reserve" have no object, and the section does not expressly state what it is that the President shall "set apart and reserve." It is only by striking out the word "in" before "any part of the public lands" that its meaning becomes clear. Of course, the United States could not make a part of a reserve anything but public land, but

Congress well knew that in the establishment of a reserve there would necessarily be scattered tracts of land which had passed into State or private ownership and could well legislate for their voluntary relinquishment to the United States. The act of March 3, 1891, was under consideration at the time of the passage of the act of February 28, 1891.

Rice v. *State of California* (24 L. D. 14), decided by Secretary Francis January 8, 1897, held (syllabus):

> The title of the State to school lands vests at the date of the completion of the survey, and if the land is not then known to be mineral in character the subsequent discovery of mineral thereon will not divest the title that has already passed.
>
> The State by a school indemnity selection in lieu of land alleged to be mineral in character waives its claim to the basis, which may be thereupon disposed of as part of the public domain.

The report of the case discloses that the department found that the land had vested in the State, as it was not known to be mineral at the time of survey. Secretary Francis, however, held, at page 15:

> Under the terms of this statute it is clear that the State may make indemnity selections whenever any of its granted school lands are found to be mineral in character. In reference to the land in controversy the State has, presumably, satisfied itself that it does not fall within the terms of its grant and has selected other lands in lieu thereof. The department,

in commenting on the proviso above quoted, has said:

> Conceding that the school grant attached to the specific sections after they were designated by the survey, the State having selected equivalent land in lieu thereof, the Government may hold the State to its waiver of the school sections and dispose of it as part of the public domain. (*Gregg et al.* v. *Colorado*, 15 L. D. 151.)
>
> It seems to me that this rule may be applied in the case at bar and that the State by reason of its selection is estopped from making any further claim to the land in controversy.

This holding is in harmony with the view expressed in this brief, but is contradictory in principle to the case of *State of California* (19 L. D. 585).

In *Hibberd* v. *Slack* (84 Fed. Rep. 571), decided December 6, 1897, it was held by the Circuit Court for the Southern District of California, that sections 2275 and 2276, Revised Statutes, as amended by the act of February 28, 1891, do not authorize a State to select indemnity in lieu of school lands, which, after they have been surveyed and the title has thereby become vested in the State, are included within the exterior boundaries of a forest reservation. The plaintiffs claimed under an indemnity selection by the State of California based upon a school section included in a forest reservation after survey. The report states that the selection had been accepted by the Commissioner of the General Land Office. If this means that the indemnity lands had been

actually certified to the State, we submit that the court's decision was erroneous, upon the ground that such certification could not be collaterally attacked, but would have to be set aside by direct action instituted for that purpose. A certification is the equivalent of a patent as to the vesting of title, and it is well established that a patent can not be attacked collaterally. If the land had not been certified to the State, the court was endeavoring to adjudicate a matter which was under the course of adjudication by the Land Department, and its action therefore was premature. These objections, however, do not appear to have been urged upon the court, which proceeded to decide the question upon the merits.

Its decision refers to that of the Department of the Interior in *State of California* (19 L. D. 585), and the apparently contradictory action in *Rice* v. *State of California, supra*. The conclusion of the court, however, was not based upon the department's reasoning in the *State of California* (19 L. D. 585).

The court first pointed out that title to a school section vests at the time of survey. It then states, at page 574:

> * * * After title has thus vested, the section is not subject to any further legislation by Congress.

This language is too broad. Of course, in the sense that Congress could not pass any law which would impair the title of the State, the statement is correct. However, Congress was fully empowered to pass legislation which would permit the State to

voluntarily relinquish such sections and select public lands in lieu thereof. The decision then points out that prior to the passage of the act of February 28, 1891, the principle was well established that indemnity could be given only for an actual loss or deficiency incurred. This is correct, but the court wholly failed to take into consideration the fact that sentence No. 3 was incorporated into the measure by amendment in the Senate as a new provision and that its interpretation makes such incorporation absolutely unnecessary, as the matter of school sections placed in a reservation prior to survey had already been covered in sentence No. 2.

The case of *State of California* (19 L. D. 585) was vacated by the department upon review January 30, 1899, in a decision by Acting Secretary Ryan, approved by the then Assistant Attorney General Van Devanter. (*State of California*, 28 L. D. 57.) It was there held that where a forest reservation includes within its limits a school section surveyed prior to the establishment of the reservation, the State, under authority of section 2275, Revised Statutes, as amended by the act of February 28, 1891, may be allowed to waive its right to such section and select other lands in lieu thereof. The case, however, made no reference to that of *Hibberd* v. *Slack*, *supra*. The department's decision was promulgated to all registers and receivers by the circular of March 11, 1899. (28 L. D. 195.) It was also adhered to in the case of a grant to a territory. (*Territory of New Mexico*, decided Feb. 15, 1899, 29 L. D. 364.) In an opinion by

Assistant Attorney General Van Devanter (30 L. D. 468) rendered January 26, 1901, and approved by Secretary Hitchcock, the position was taken that:

> A selection authorized by the State of lands in lieu of sections sixteen and thirty-six in a forest reservation, where the right of the State to said sections has attached under its school grant prior to the establishment of the reservation, is such a waiver of its right to said sections as to obviate the necessity for the formal relinquishment thereof to the United States, as required by circular instructions of March 11, 1899.

The decision was again adhered to in *Dunn et al* v. *State of California* (30 L. D. 608), decided May 15, 1901; the regulations of January 10, 1906 (34 L. D. 365); *Territory of New Mexico* (34 L. D. 599), decided May 9, 1906; and *State of California* (34 L. D. 613), decided May 22, 1906. In *Territory of New Mexico*, the department expressly referred to *Hibberd* v. *Slack* and refused to follow it.

Assuming that the act of February 28, 1891, is susceptible of either construction, it should be pointed out that the construction herein adopted operates to the mutual benefit of both the State and the United States. In *State of California* (19 L. D. 585), Secretary Smith said at page 586:

> I should be glad to be able to conclude that the right does exist, for the contrary view must necessarily result in great inconvenience both to the State and the United States.

In *State of California* (28 L. D. 57), Acting Secretary Ryan said at page 61:

> Congress knew when these acts were under consideration that such reservations would necessarily embrace, in many instances, lands which had been granted, reserved, or pledged to States and Territories for the use of public schools. It surely knew also that these reservations would frequently contain surveyed townships or portions thereof within which would be the school sections sixteen and thirty-six which had passed to the States or were reserved or pledged to the Territories, and that these sections, entirely surrounded by Government lands and sometimes far within the boundaries of the reservations, would be of little or no benefit—as is alleged to be the fact in the case at bar—to the States or Territories while the reservations existed. It is very desirable on the part of the United States that in all cases where reservations are made the land therein should be subject, as far as possible, to the same governmental authority and jurisdiction in order to successfully carry out the objects sought in creating them. It is believed, therefore, that the conclusion herein reached accords with the intent of Congress, and is in pursuance of a wise public policy.

CONCLUSION.

The rule laid down in the *State of California* (28 L. D. 57) has been consistently adhered to by the Land Department. Many selections have been made thereunder and no doubt large expenditures of money have been made in good faith upon the selected lands. It has, therefore, become a rule of property and should not be disturbed. The courts, except when there are strong reasons for a contrary course, respect the construction of a statute upon which the department has uniformly proceeded in the administration of the public lands. (*McMichael* v. *Murphy*, 197 U. S. 304.) In this matter every reason of public policy and justice operates to sustain the department's construction of 18 years' standing.

The decision of the Supreme Court of California should be reversed, and the condemnation proceedings instituted in this cause be dismissed.

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